IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-945

BOROUGH OF ELLWOOD CITY,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
PENNSYLVANIA POWER COMPANY,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner Borough of Ellwood City prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above case on August 8, 1978.

ORDERS AND OPINIONS BELOW

The initial decision of the Presiding Administrative Law Judge, issued April 15, 1975, in Federal Power Commission [1] Docket No. E-7317, *Pennsylvania Power*

[1] Pursuant to the provisions of the Department of Energy Organization Act, Public Law 95-91, 42 U.S.C. § 7101 (August 4, 1977), and Executive Order No. 12009, 42 Fed. Reg. 46267, Septem-

Company, appears in Appendix A hereto. The order of the Commission issued March 8, 1977, affirming the initial decision appears in Appendix B hereto. The order of the Commission issued April 29, 1977, denying rehearing appears in Appendix C hereto. The August 8, 1978, opinion of the Court of Appeals affirming the Commission's order appears in Appendix D hereto. The September 13, 1978, order of the Court of Appeals denying rehearing appears in Appendix E hereto. None of the orders or opinions are yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on August 8, 1978. The order of the Court of Appeals denying rehearing was entered on September 13, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Did the Court of Appeals err in holding that the filed rate doctrine is not applicable where the Federal Power Commission ordered a power company to file with it a five-year contract governing the sale in interstate commerce for resale of electric energy to a municipality; accepted the filing as the appropriate rate schedule applicable to that sale; and then stood by for a period of 25 years doing nothing while the power company, in total disregard of the filing requirements of Section 205 of the Federal Power Act, placed into

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ber 13, 1977, the Federal Power Commission ceased to exist on September 30, 1977. The Federal Energy Regulatory Commission, to which most of the FPC's powers were transferred, was substituted as Respondent in this case pursuant to Section 705(e) of the Organization Act, 42 U.S.C. § 7295(e).

effect a series of increases in its rates to the municipality that aggregated over the years excess charges substantially above those for the legal rate called for by its filed tariff?

2. Did the Court of Appeals err in holding that it was within the Federal Power Commission's discretion to excuse a power company's past failure to file changes in its legally-established filed rate notwithstanding the requirement in Section 205(d) of the Federal Power Act that "no change shall be made . . . in any such rate . . . except after 30 days' notice to the Commission and the public"?

STATUTORY PROVISIONS INVOLVED

The relevant portion of Section 205 of the Federal Power Act, 16 U.S.C. Sec. 824d(c) and (d), provides:

> (c) Under such rules and regulations as the Commission may prescribe, every public utility shall file with the Commission, within such time and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission, and the classification, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.
>
> (d) Unless the Commission otherwise orders, no change shall be made by any public utility in any such rates, charges, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or

schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

STATEMENT OF THE CASE

On October 21, 1966, the Borough of Ellwood City, Pennsylvania (Ellwood) filed with the Federal Power Commission a complaint under Section 306 of the Federal Power Act, 16 U.S.C. § 825e, against the Pennsylvania Power Company (Penn Power). Penn Power is the sole supplier at wholesale of electric energy to Ellwood and such service is, and has continuously since 1939 been, subject to the jurisdiction of the Commission. The gravamen of the complaint was that Penn Power had, between December 16, 1939, and September 3, 1964, unlawfully collected from Ellwood and electric consumers of Ellwood City substantial charges in excess of lawful rates filed with and regulated by the Commission under the Federal Power Act. Ellwood asked the Commission to institute under Section 306 an investigation into the subject matter of the complaint. On January 26, 1967, Penn Power answered Ellwood's complaint and in addition moved to dismiss it. On April 19, 1967, Ellwood filed a reply to Penn Power's motion to dismiss. On May 4, 1967, Penn Power filed a "rejoinder" to Ellwood's reply to the motion to dismiss. By letter dated May 5, 1967, Ellwood advised the Commission that Penn Power's "rejoinder" was not permitted under the Commission's rules of practice, and requested the Commission to reject that pleading or to give Ellwood reasonable opportunity to respond

thereto. Ellwood received no response from the Commission regarding this request.

No action on the complaint was taken by the Commission and by letter dated January 15, 1969, Ellwood inquired as to the status of the proceeding. Thereafter, on January 28, 1969, Mr. Robert Woods, Assistant General Counsel of the Commission, requested Ellwood to participate in an informal conference with the Commission's Staff and Penn Power. Such a conference was held on February 11, 1969, at the Commission's offices.

Nothing further was heard from the Commission concerning the complaint except that on September 5, 1969, Mr. Robert Woods orally advised counsel for Ellwood that the complaint was still under active consideration by the Commission's Staff. By letter dated July 22, 1970, Ellwood again inquired into the status of the complaint. No answer to this inquiry was received from the Commission.

On September 11, 1973, Ellwood filed in the United States District Court for the District of Columbia a Complaint For Order In The Nature Of Mandamus (Civil Action No. 1740-73) which sought a mandatory order compelling the Commission to proceed without further delay to investigate and hear the complaint which had been before the Commission for nearly seven years. On November 12, 1973, the date its answer was due in the District Court, the Commission issued its order instituting an investigation and denying Penn Power's motion to dismiss the complaint. On the same date, the Commission filed a motion to dismiss the mandamus action on the ground that the action had been mooted by the order instituting the investigation.

Ellwood did not contest the motion and the action was dismissed.

The order of investigation stated that the purpose of the investigation would be to determine whether the Commission had jurisdiction over the sales of electric energy for the period 1939 to 1964. Assuming the Commission had jurisdiction, the parties were directed to submit evidence directed to the issue of "whether excess charges have been collected and, if so, how such excess charges should be measured." A hearing was held before an Administrative Law Judge in August, 1974.

There was no dispute as to the basic facts supporting the complaint. On November 8, 1935, Penn Power entered into a five-year contract with Ellwood covering sales of electric energy to begin on December 1, 1935. By letter dated October 22, 1938, the Commission notified Penn Power that its November 8, 1935, contract with Ellwood involved an agreement "for the transmission and sale of electric energy in interstate commerce" and directed Penn Power to file copies of the agreement with the Commission in compliance with Commission Order No. 50, Part 35. Part 35 of the Commission's rules deals with the filing of rate schedules pursuant to Section 205 of the Federal Power Act which had become effective August 26, 1935. Prior to that time, the Commission did not have jurisdiction over rates.

By letter dated October 31, 1938, Penn Power transmitted to the Commission a rate schedule identified as "Pa. P.U.C. No. 27, Original Sheet No. 22, Rate No. 48(c) Applicable to Ellwood City Boro" in purported compliance with the Commission's directive of October

22, 1938. By letter dated November 22, 1938, the Commission advised Penn Power that such rate schedule did "not represent copies of your contractual agreements of which the rate schedules are a part" and directed Penn Power to "submit, in compliance with the Commission's Rules of Practice and Regulations, copies of the rate schedule agreements as set forth in our letter of October 22, 1938." Acting "[p]ursuant to [the Commission's] letter of November 22, 1938" Penn Power, by letter dated December 8, 1938, transmitted to the Commission its contractual agreement with Ellwood dated November 8, 1935.

By letter dated October 18, 1939, the Commission notified Penn Power that "[T]he agreement dated November 8, 1935 between your company and the Borough of Ellwood City, Pennsylvania, together with Rate No. 48(C) has been numbered: Pennsylvania Power Company, Rate FPC No. 6, Effective Date: December 1, 1935, Filing Date: December 9, 1938." By letter dated October 20, 1939, Penn Power acknowledged receipt of the Commission's letter dated October 18, 1939 "wherein you advise us to the effective date and numbering assigned to rate schedule agreements filed with your Commission."

At the time the Commission directed Penn Power to file its contract with Ellwood, Penn Power had no generating facilities of its own and purchased all of its energy from its affiliate which generated the electricity in Ohio and transmitted it across the state line to Pennsylvania. In 1939, Penn Power constructed its own generating facilities in Pennsylvania, but it continued to purchase power from its affiliate. The first unit of Penn Power's New Castle coal-fired generating station began commercial operation on May 5, 1939.

Penn Power argued that from that point in time it assumed that the sales to Ellwood were not subject to the Commission's jurisdiction. It did not, however, seek to withdraw or cancel the filed rates.

Penn Power did not file with the Federal Power Commission any amendments to Rate Schedule FPC No. 6 until August 3, 1964, at which time it filed several changes which it had previously filed with the Pennsylvania Public Utility Commission. The 1964 filings were purportedly to comply with the Commission's Order No. 282, 31 F.P.C. 972 (1964), which was promulgated as a consequence of this Court's decision in the *Colton* case, *Federal Power Commission* v. *Southern California Edison Company,* 376 U.S. 205 (1964). That decision affirmed Commission jurisdiction under the Federal Power Act over sales for resale where part of the energy sold was from out of state. Order No. 282 permitted all existing rate schedules for wholesale sales which had not previously been filed with the Federal Power Commission to be filed as initial rate schedules provided they were made on or before August 1, 1964.

In substance, the August 3, 1964, filing consisted of the tariff sheets Penn Power had filed with the Pennsylvania Commission to be effective on December 16, 1939; December 1, 1940; April 16, 1948; and an unspecified date. Such tariff sheets were accepted for filing and designated Supplement Nos. 1, 2, 3, and 4 to Penn Power's Rate Schedule FPC No. 6, signifying that they represented amendments or modifications to the basic rate schedule. The Commission assigned a September 3, 1964, effective date to Supplement No. 4, or 30 days after the filing date of August 3, 1964. However, it assigned no effective dates to Supplement Nos. 1, 2, and 3.

The changes which Penn Power made in its rates for billings to Ellwood prior to the 1964 filing with the Federal Power Commission were described by Witness Lim as follows:

> "The Company filed with the Pennsylvania Commission an amendment to be effective December 16, 1939 adding fuel and tax adjustment clauses. However, the bills to the Borough under this amendment show only base rate changes.
>
> "The Company next filed with the Pennsylvania Commission a rate change to be effective December 1, 1940. That filing modified the form of the base rate and eliminated the load building discount provision while rolling it into the base rate, in part.
>
> "The Company next filed with the Pennsylvania Commission a rate change to be effective April 16, 1948. That filing modified the rate form and increased the rate.
>
> "The next rate change was that embodied in the rate which became Supplement No. 4. Although the filing with FPC did not indicate when it was made effective as part of the Company's Pennsylvania tariff, it was applied to Ellwood City's billings beginning with the February 29, 1960 meter reading date. That was an increase in rates.
>
> "Thereafter, the rate remained unchanged until, and for sometime after, the 1964 filing with the Federal Power Commission." (JA, pp. 24a-25a).[2]

[2] "JA" refers to the administrative record in the Joint Appendix before the Court of Appeals below.

Exhibit 15 compared charges pursuant to Rate Schedule FPC No. 6 and charges actually billed to Ellwood from meter reading days of November 30, 1935, to August 31, 1964. The results of the comparison for the period showed that the charges actually billed were $312,464 greater than those calculated at the FPC filed rates. Penn Power conceded that Exhibit 15 accurately stated the difference between the charges actually billed and those calculated at the rate on file with the Federal Power Commission during the period in question. It also conceded that the Federal Power Commission had jurisdiction over the sales to Ellwood during this period.

On April 15, 1975, the Presiding Administrative Law Judge issued his initial decision dismissing Ellwood's complaint (App. A hereto). He held that the filed rate doctrine, upon which Ellwood relied, is not binding on the Commission and thus it could waive refunds or give Penn Power's late filings *nunc pro tunc* effective dates. He concluded that the complaint of the municipality was within the discretion of the Commission which it should not exercise by granting relief.

Exceptions to the initial decision were filed by Ellwood and on March 8, 1977, the Commission issued its order affirming the initial decision in all respects (App. B hereto). Ellwood filed a petition for rehearing before the Commission and on April 29, 1977, the Commission issued its order denying rehearing (App. C hereto). The order denying rehearing rendered the order of March 8, 1977, final and judicially reviewable under the provisions of Section 313(b) of the Federal Power Act, 16 U.S.C. § 825e(b). A petition for review was filed with the United States Court of

Appeals for the Third Circuit. That Court entered its Judgment and Opinion on August 8, 1978, affirming the Commission's decision and orders.

The Court noted that "the Commission's position is that the filed rate doctrine does not limit its power and that it may always, after balancing the equities, deny refunds of excess charges." Stating that it "need not decide whether the Commission's discretion is indeed this broad," the Court affirmed the Commission's order on different grounds. The Court held:

> "In 1938, the Commission requested that Penn Power file the agreement on the basis of which the sales to Ellwood were made. Penn Power filed this agreement after being told that the filing of the rate itself was not proper. § 205(d) of the Federal Power Act, 16 U.S.C. § 824d(d) prohibits changes in any 'rate charge, classification, or service, or in any rule, regulation or *contract* relating thereto' without proper filing. The contract which was filed here, by its terms, terminated after five years. The current regulation, 18 C.F.R. § 35.15 (1977), requires filing with the Commission before 'a rate schedule or part thereof required to be on file with the Commission is proposed to be cancelled or *is to terminate by its own terms.*' As late as 1961, this regulation then numbered 18 C.F.R. § 35.05 referred only to filing cancellations and did not specifically require filing where a contract, as the one here, terminated by its own terms. Since the statute requires filing of *changes,* and there was no change, and since the regulation applicable at the time the contract terminated did not require filing where a contract was terminated by its own terms, Penn Power properly considered the rate it filed in 1938 to be of no effect after 1940. We therefore hold that there was no effective filed rate applicable to the

sales in question and, as a result, the filed rate doctrine is not applicable.

> "An alternative basis for this conclusion is that the filed rate doctrine provides no basis for distinguishing between companies who filed rates in the past and those who did not file at all. As already discussed, courts have held that where the Commission has jurisdiction over given sales and the parties have agreed to a certain rate, that rate may not be increased without prior filing even though the initial rate was never filed.[13] Ellwood therefore has no greater claim to a refund than does any other purchaser whose supplier's past failure to file is excused pursuant to Order No. 282. Thus if the Commission has the discretion under these circumstances to excuse past failures to file and we have just held that it does, the filed rate doctrine imposes no special obstacle to the exercise of that discretion with respect to Penn Power here." [Footnote omitted.]

Ellwood petitioned the Court of Appeals for a rehearing pointing out that the conclusions set forth above embrace both misapprehensions of fact and of law. First, the Court misapprehended the facts. The Commission in 1938 required Penn Power to file both the agreement covering the sales to Ellwood City and the schedule of rate charges which were a part of the agreement. In addition, the Court failed to note that while the regulation applicable at the time did not specifically require filing where a contract expired on its own terms, it was the policy of the Commission to require such a filing (JA, p. 25a). In any event, there is no basis for holding that there was "no change" which the statute required to be filed. Clearly, as the record shows, the first change in the rates on file was made on December 16, 1939, almost a year prior to the expiration of the contract, and this change and subsequent changes were not filed with the Commission as required by the statute.

In addition, the Court erred in holding alternatively that "the filed rate doctrine provides no basis for distinguishing between companies who filed rates in the past and those who did not file at all." True enough, the doctrine has been extended in a few cases to embrace the latter situation, although the statutory language would not require such a holding. This is no basis, however, for holding that the statutory language may be disregarded in the former situation where rates that are on file are sought to be changed.

On September 13, 1978, the Court of Appeals entered its order denying rehearing without comment (App. E hereto).

REASONS FOR GRANTING THE WRIT

Petitioner submits that the Court of Appeals has decided important questions of federal law in a way in conflict with applicable decisions of this Court and in conflict with the decisions of other courts of appeals. At the outset, we emphasize that this case falls squarely within the filed rate doctrine. The cases upon which we rely hold: that "so long as the filed rate is not changed in the manner provided by the [Federal Power] Act it is to be treated as though it were a statute, binding upon the seller and the purchaser alike;"[3] that "not even a court can authorize com-

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[3] *Northwestern Public Service Co.* v. *Montana-Dakota Utilities Co.*, 181 F.2d 19 (8th Cir. 1950), aff'd 341 U.S. 246 (1951).

merce in the commodity on other terms;"[4] and that "deviation from [the filed rate] * * * is not permitted upon any pretext."[5]

As the Court of Appeals noted, "the core of the filed rate doctrine, as it applies to electric utilities, is contained in . . . § 205(c,d) of the Federal Power Act, 16 U.S.C. §§ 824d(c) and 824d(d)." Section 205(c) provides in part that "every public utility shall file with the Commission . . . schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission, and the classification, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to [them]." Section 205(d) requires in part that "[u]nless the Commission otherwise orders, no change shall be made by any public utility in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after 30 days' notice to the Commission and to the public."

In *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332, 343 (1956), this Court said that the virtually identical language in Section 4(d) of the Natural Gas Act "means simply that *no* change—neither a unilateral change to an *ex parte* rate nor an agreed upon change to a contract—can be made by a natural gas company without the proper notice to the Commission." (Emphasis the Court's.) This reasoning was held applicable to the Federal Power Act in *Federal Power Commission* v. *Sierra Pacific Power Co.*, 350 U.S. 348 (1956).

[4] *Montana-Dakota Utility Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246 (1951).

[5] *Louisville & Nashville R.R.* v. *Maxwell*, 237 U.S. 94 (1915).

As the Court noted in *Northwestern Public Service Co.* v. *Montana-Dakota Utilities Co.*, supra:

> ". . . the transmission of electric energy being at wholesale and interstate, the seller must collect the charge named in the filed rate and the purchaser must pay that rate. So long as the filed rate is not changed in the manner provided by the Act it is to be treated as though it were a statute, binding upon the seller and the purchaser alike." [citations] 181 F.2d at 22.

In that case, the Court also observed that "the plan or scheme of the Federal Power Act is analogous to that of the Interstate Commerce Act, 49 U.S.C.A. 1, *et seq.*, and decisions under the latter act should be controlling here." 181 F.2d at 22.

In *Chicago, M., St. P. & P.R. Co.* v. *Alouette Peat Products, Ltd.*, 253 F.2d 449 (9th Cir. 1957), the Court ordered the Interstate Commerce Commission to award to shippers the difference between charges collected under a tariff which had not been published on the statutory 30 day notice, and the charges that would have been collected under the immediately prior published tariff, even though the Commission had found that the rates were not unjust or unreasonable. There the Commission gave the railroads special permission to make effective on five days' notice specific increased rates on peat. The railroads published, filed and made effective on five days' notice increased rates in excess of those authorized. When the shippers complained, the Commission found that the higher rates were justified and refused to order refunds. The Court held that the increases, not having been authorized, had not been legally

established and that the "only existing legally established" rates were the prior rates. The Court stated:

> "Looking again at Paragraph 3 of Section 6 of the [Interstate Commerce] Act, we find the clearly expressed requirement that 'no change shall be made in the rates * * * except after thirty days' notice to the Commission and to the public published as aforesaid * * *', unless the Commission allows changes upon less than the notice specified. The Commission found as a fact that this mandatory provision of the statute concerning publication was not complied with, and 'when the facts have been resolved by the Commission upon evidence, there is no escape from the application of the broad provision of the statute.' Louisville & N. R. Co. v. U.S., supra, 282 U.S. at page 758, 51 S.Ct. at page 304. No case has been cited by appellants, nor has the Court found one, holding that the Commission has authority to repeal that section of the Act of Congress requiring publication in order to establish rate changes, which the Commission in effect has attempted to do by holding that the increased rate was not 'otherwise unlawful', despite its finding that that section of the statute had been violated. The Commission erred, after having found the fact, in failing to 'apply the broad provisions of the statute.'" 253 F.2d at 454.

The above cases clearly establish that the filed rate doctrine not only applies to the Commission, but imposes on it the duty to vindicate violations of the Federal Power Act by ordering the refund of monies illegally collected above the lawfully filed rate. We know of no case where the Commission or the courts have permitted any deviation from legally established filed rates. On the other hand, the cases are legion where strict adherence to filed rates was required. See, *e.g.*, *Sunray DX Oil Company*, 29 F.P.C. 1295 (1963); *Wisconsin-Michigan Power Company*, 10 F.P.C. 170 (1951), affirmed *sub nom. Wisconsin-Michigan Power Company* v. *Federal Power Commission*, 197 F.2d 472 (7th Cir. 1952), *cert.* den'd 345 U.S. 934 (1953); *St. Michael's Utility Commission, et al.* v. *Eastern Shore Public Service Company*, 31 F.P.C. 1161 (1964); and *Phillips Petroleum Company* v. *Ashland Oil and Refining Co.*, 40 F.P.C. 390 (1968), affirmed *sub nom. Ashland Oil and Refining Company* v. *Federal Power Commission*, 421 F.2d 17 (6th Cir. 1970).

The courts have long recognized that equitable considerations are irrelevant in cases such as this. As the Court observed in *Nyad Motor Freight, Inc.* v. *W. T. Grant Company*, 486 F.2d 1112 (2nd Cir. 1973): "It has been clear at least since Justice Hughes' opinion in Louisville & Nashville R.R. v. Maxwell, 237 U.S. 94, 35 S.Ct. 494, 59 L.Ed. 853 (1915), that a common carrier may, despite its own complicity, recover any illegal differential between its filed rates and the actual charges made." 486 F.2d at 1114. In the *Louisville & Nashville* case, this Court said:

> Deviation from [the filed rate] * * * is not permitted upon any pretext. Shippers * * * are charged with notice of it, and they as well as the carrier must abide by it * * *. Ignorance or misquotation of rates is not an excuse for paying or charging either less or more than the rate filed. This rule is undeniably strict and it obviously may work hardship in some cases, but it embodies the policy which has been adopted by Congress . . . . 237 U.S. at 97.

Clearly, therefore, the holding of the Court of Appeals flies in the face of the filed rate doctrine and conflicts with the decisions of this Court and with the decisions of other courts of appeals. Certainly, this holding merits plenary review by this Court.

PRAYER

Petitioner submits that the foregoing establishes the presence of "special and important" reasons for granting this petition.

Wherefore, Petitioner prays the Court to issue a writ of certiorari to the United States Court of Appeals for the Third Circuit to review its decision in this case.

Respectfully submitted,

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December 12, 1978

APPENDIX

APPENDIX A

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Pennsylvania Power Company) Docket No. E-7317

INITIAL DECISION ON INVESTIGATION
OF
ALLEGED EXCESS CHARGES

(April 15, 1975)

APPEARANCES

James R. Edgerly and *Steven A. Berger* for Pennsylvania Power Company

Patrick McEligot for Borough of Ellwood City, Pennsylvania

Steven G. Gerhart for the Staff of the Federal Power Commission

CONVISSER, Presiding Administrative Law Judge:

This proceeding involves an investigation of a complaint and petition for investigation under Section 306 of the Federal Power Act, 16 U.S.C. 825e, filed with the Commission by the Borough of Ellwood City, Pennsylvania (Ellwood) and alleging overcharges by Pennsylvania Power Company (Penn Power) during the period December 12, 1939, to September 3, 1964.

Background

In November, 1935, Penn Power entered into an agreement with Ellwood for the sale of electric power for a period of five years beginning December 1, 1935 (Exh. 1, Tr. 14). By letter dated October 22, 1938, Penn Power was directed by FPC to file this agreement (Exh. 2). Penn Power complied (Exh. 3-6). The filing was accepted as Rate Sched-

ule FPC No. 6 (Exh. 7). In 1938 Penn Power had no generating facilities of its own (Tr. 39); it purchased electric power from Ohio Edison Company, in the State of Ohio, and transmitted it to Ellwood and its other Pennsylvania customers (Tr. 78). Ellwood and others were wholesale customers and the sales and transmission thus were subject to FPC jurisdiction. However, in 1939 Penn Power installed generating facilities in Pennsylvania sufficient to meet the needs of all its wholesale customers (Tr. 79), but it also continued to purchase power from Ohio Edison Company. Thereafter and during a period of approximately 25 years Penn Power filed with the Pennsylvania Public Utility Commission, and received approval therefrom for, a number of rate increases (Tr. 39). Ellwood was a party to some of these proceedings before the Pennsylvania Commission and Penn Power gave FPC notice, for information purposes, of some of these rate changes (Tr. 81-82).

Thereafter, the *Colton* case was decided, *F.P.C.* v. *Southern California Edison Company*, 376 U.S. 205 (1964), following which this Commission issued Order No. 282 on April 21, 1964, 31 FPC 972, stating its policy with respect to rate filings that seemed to be required under *Colton*. The Commission stated that if the filings were made on or before August 1, 1964, favorable consideration would be given to making the schedules effective as of such earlier date as the utility might show to be consistent with the public interest.[1] Penn Power tendered for filing its then present and past unfiled wholesale rate schedules on July 31, 1964. On September 10, 1964, the Commission notified Penn Power that it had accepted the schedules, with a filing date of August 3, 1964, and had designated them, respectively, Supplements No. 1, 2, and 3 to Rate Schedule FPC No. 6, Supplement No. 1 to Supplement No. 3 to Rate Schedule FPC

[1] Order No. 282 is more fully discussed below.

No. 6 and Supplement No. 4 to Rate Schedule FPC No. 6 (effective September 3, 1964).[2]

Ellwood, on October 21, 1966, filed its complaint seeking to recover $272,500, that being the approximate amount of revenues then claimed to have been collected by Penn Power in charges allegedly in excess of the legal rates during the period December 12, 1939, to September 3, 1964.

On May 22, 1974, Ellwood filed a motion, to reject Penn Power's prepared testimony and exhibits as "irrelevant to the determinations to be reached herein." The Commission did not act on this motion, which I assume it left to the Presiding Administrative Law Judge to decide. See Section 1.12(d), Rules of Practice and Procedure. At the hearing Penn Power moved to strike Ellwood's testimony as to Penn Power's discount (Tr. 27-29). I denied the motion without prejudice to its renewal by brief. Penn Power did renew its motion.

On November 12, 1973, the Commission ordered an investigation and hearing. The hearing was held on August 20, 1974.

[2] Staff's answer opposing a motion by Ellwood to strike Penn Power's testimony and exhibits (p.2), described the FPC designations as follows (Staff referred to Penn Power as PPC): (1) Supplement No. 3 to Pa. PUC No. 27, First Revised Sheet No. 22 and Original Sheet No. 5-D, dated October 16, 1939, were designated Supplement No 1 to PPC Rate Schedule FPC No 6 and given no effective date; (2) Supplement No. 6 to Pa. PUC No. 27, Second Revised Sheet No. 22, dated October 1, 1940, and Original Sheet No. 5-D were designated Supplement No. 2 to PPC Rate Schedule No. 6 and given no effective date; (3) Pa. PUC No. 29, Original Sheet No. 12 and Original Sheet No. 6, dated February 16, 1948, were designated Supplement No. 3 to PPC Rate Schedule FPC No. 6 and given no effective date; and (4) the undated Municipal Resale Service Schedule was designated Supplement No. 4 to PPC Rate Schedule No. 6 and given an effective date of September 3, 1964, thirty days after the filing date of August 3, 1964. Staff's description was not challenged.

Positions of the Parties

Ellwood relies on the filed-rate doctrine, which, it argues, admits of no exception: Penn Power's only lawful rate was its contract with Ellwood, constituting Rate Schedule No. 6, filed with the Commission in 1938 and not changed until 1964; all charges in excess of those specified in that schedule were overcharges and the Commission must order refunds, which, indeed, it is without authority to deny. Moreover, Ellwood asserts that a clause in the contract providing for a discount, limited to the term of the contract and to be credited upon the termination of the contract on December 1, 1940 (Exh. 1, p. 4), remained in effect until 1964 because FPC schedule No. 6 was not supplemented or modified prior to that year.

Finally, Ellwood shows that the alleged overcharges, including the failure to continue to allow the discount after December 1, 1940, amount to $312,465 (increased from the $272,500 claimed in its complaint) (Exh. 15), an amount which, assuming the contested premise, is conceded to be substantially correct (Tr. 3).

Penn Power disputes the rigidity of the filed-rate doctrine. It asserts that the Commission has the equitable power, and should exercise it, to look no further into possible refunds once it determines that "the non-compliance was borne [sic] out of a good faith belief that the Commission's jurisdiction did not attach to the transaction involved." That concededly is what the Commission did in *Plaquemines Oil and Gas Company,* 43 FPC 620, 623 (1970). And, if it should be found to be unreasonable to conclude that there was such excuse for noncompliance, as was the case for part of the period in *Plaquemines,* Penn Power continues, the Commission should recreate the past, insofar as reasonably possible, " 'to regard as being done that which should have been done' ", as the basis for ordering refunds, if any, as was required by the Court in *Plaquemines Oil and Gas Co.* v. *F.P.C.,* 450 F2d 1334 (D.C. Cir. 1971).

Asserting that it filed no change in FPC Schedule No. 6 between 1938 and 1964 in the good-faith belief that its wholesale rates then were not subject to FPC jurisdiction, Penn Power argues that, in any event, a reconstruction of the past would have entitled it both to a fuel adjustment and the termination of the discount, which would have eliminated the claimed overcharge.[3]

Staff's position is that the equities favor Penn Power and its failure to comply with the filing requirements of Section 205(c) of the Federal Power Act, 16 U.S.C. 824d(c), should be excused by the Commission in the exercise of its equitable powers; alternatively, should this position not prevail, an effort should be made to determine what was the just and reasonable rate during the period with which this case is concerned. In the latter connection, Staff does not take a position with respect to Penn Power's claim to a fuel adjustment for that period but does agree that the discount should be disallowed as of the date set by the contract for its termination.

Discussion and Findings

The filed-rate doctrine fends off interference with a regulatory agency's jurisdiction; it does not impede the exercise of that jurisdiction. Stated simplistically, the rule is that the agency may accept or alter a rate, but the rate as filed, *i.e.,* accepted or altered by the agency, is binding and not elsewhere subject to question or attack. Ellwood's argument that the doctrine holds the agency in a vise that prevents it from dealing, in accordance with its authority and duty under its governing statutes, with certain types of exigencies within its jurisdiction is a perversion of the doctrine. The categorical terms in which the restraints imposed

[3] The fuel adjustment would have brought revenue of $280,000 (Tr. 42, Exh. 17) and, together with elimination of the discount, "would have resulted in billings . . . totaling . . . $88,221.24" more than Ellwood was actually billed (Tr. 43).

by the doctrine are sometimes couched are misconstrued by Ellwood as being addressed to the Commission, although they are meant to manifest the impregnability of the wall protecting the regulatory jurisdiction from intrusion.

Ellwood's misconception is not unique, and the arguments in the present case have focused erroneously on the rigidity of the doctrine in its claimed application to the agency, on whether it admits of some exceptions and on whether this case is distinguishable from the precedents in which the Commission has burst the allegedly applicable restraints of the doctrine.

Not surprisingly, Ellwood has cited no case supporting the view that the filed-rate doctrine is a limitation on agency authority. For example, it cites *Louisville & Nashville R.R.* v. *Maxwell*, 237 U.S. 94 (1915), a suit brought by a railroad passenger to recover alleged overcharges for being carried on one route, although there was another route for which the rate was lower. The Court held that the passenger had specified the route and the charge therefor was the filed rate, behind which a Court could not go.

Also cited was *Montana-Dakota Utility Co.*, v. *Northwestern Public Service Co.*, 341 U.S. 246 (1951),[4] which is somewhat complicated. It is sufficient here to note that it was a suit by a utility against the parent of its predecessor for fraud in causing the establishment of unreasonably low rates for electric energy sold by the predecessor to the parent. The Supreme Court affirmed the dismissal below because it held that the courts were bound by the filed rate even if they were induced by fraud. The Court further held that the case should not be remanded to the Federal Power Commission to consider the justness of the rate in the con-

[4] Not noted by Ellwood is the fact that the Court affirmed *Northwestern Public Service Co.*, v. *Montana-Dakota Utility Co.*, 181 F. 2d 19 (8th Cir. 1950), erroneously cited by Ellwood as *Morris* v. *Prefabrication Co.*, 181 F. 2d 22, 23.

text of the accusations of fraud, but only because the Commission has no authority to award reparations. Significantly, however, a weighty dissent by Justice Frankfurter, joined by Justices Black, Douglas and Reed, argued for a remand to the Commission for an advisory opinion, as had been done in other cases in which an agency has primary jurisdiction. In any event, it is fairly to be inferred from this case that, if the Commission had had the authority to award reparations, there would have been no question as to its authority to find the justness and reasonableness of, and, if need be, to modify, a rate filed even in the distant past.

Of course, what the parties here are really concerned with is money, and Ellwood asserts that the Commission must order all charges in excess of the rate filed in 1938 to be refunded. To reach this conclusion it necessarily contends that the filed-rate doctrine bars the Commission either from waiving refunds or giving Penn Power's late filings *nunc pro tunc* effective dates, which, in the context of this case, comes to the same thing. In my judgment Penn Power is in error.

The Commission's authority to abstain from ordering refunds appears to be well settled. In *Moss* v. *F.P.C.*, 502 F. 2d 461 (D.C. Cir., 1974), the Court said, at p. 469, ". . . the Commission is not bound to order refunds of rates collected on an interim basis under a temporary authorization issued under Section 7, even if the final order upon a certificate application contains a finding that a lower rate must be collected prospectively." [5] The Court then approved the provision of the Optional Pricing Procedure (Section 2.75 of the Commission's Rules of Practice and Procedure), authorizing a contract rate to go into effect without refund obligation six months after the filing of a petition seeking authorization therefor, even if the petition should be denied or a price lower than the contract price should be authorized.

[5] Also, see the cases cited by the Court.

In *Skelly Oil Company*, Opinion No. 492, 35 FPC 849, 854-855, (1966) confirmed in relevant part, Opinion No. 492-A, 36 FPC (1966), affirmed, *Skelly Oil Company* v. *F.P.C.*, 401 F. 2d 726 (10th Cir. 1968), the Commission took into account considerations of equity in ordering refunds only in part. And in *F.P.C.*, v. *Sunray DX Oil Company*, 391 U.S. 9, 45-46, n. 35 (1968), the Supreme Court noted, in passing but with obvious approval, the Commission's practice of considering the equities in exercising its discretion to order or not order refunds.

None of these cases, of course, involved late filings. For that we must turn to the *Plaquemines* case, Opinion No. 572-A, 43 FPC 620 (1970). There, as in the present case, a holding by the Commission that it had jurisdiction of sales that theretofore had been widely thought to be nonjurisdictional (*Lo-Vaca Gathering Company*, 26 FPC 606 (1961), reversed, *Lo-Vaca Gathering Co.*, v. *F.P.C.*, 323 F. 2d 190 (5th Cir. 1963), reversed, *California* v. *Lo-Vaca Gathering Company*, 379 U.S. 366 (1965)) resulted in a rash of late filings for certificates of convenience and necessity. Plaquemines applied in 1965 (after the Supreme Court affirmance of the Commission) for a certificate covering sales begun in 1956. The Commission, granting the certificate, ordered no refunds for the period prior to 1961, the date of its *Lo-Vaca* decision, pointing to the uncertainty as to jurisdiction before that date and saying (43 FPC at 623), "We have in this situation refrained 'as a matter of equity' from requiring refunds for periods prior to 1961, and we do so here." For the later period the Commission noted the absence of cost information, but concluded that Plaquemine's rate from 1961 to 1964, measured against the then effective in-line price, would have been found acceptable. The Commission added (43 FPC at 624), "In any event, the cost to the Commission and to the parties of attempting to reconstruct, at a new hearing, now, what the Commission might have done in 1961, would almost certainly outweigh any benefits to be gained thereby." Accordingly it ordered no refunds

for that period. However, under Plaquemine's contract a rate increase became effective on November 1, 1964, and Plaquemine's failure to make a timely application for authorization therefor was not excused. The Commission ordered refund of the revenue from this increase from November 1, 1964, to June 27, 1966, the date of Plaquemine's application for a certificate.

The reviewing court remanded the case on a very narrow point. *Plaquemines Oil and Gas Co.* v. *F.P.C.*, 450 F. 2d 1334 (D.C. Cir. 1971). There was apparently no appeal from the failure to order refunds for the period prior to November 1, 1964, although the Court noted the fact without critical or questioning comment. As to the refunds, the Court took the Commission at its word, *i.e.*, that it was "recreating the past to reflect *compliance* with the Act" (450 F. 2d at 1338, emphasis by the Court), but noted that, although the Commission had attempted to reconstruct the past with respect to the period from 1961 to October 31, 1964, as to which it had not ordered refunds, it had not done so with respect to the subsequent 1964-1966 period, as to which it had ordered refunds.

The Court observed that, in upholding the Commission's power to achieve an equitable result, it was following its own position, taken in 1967, in *Niagara Mohawk Power Corp.*, v. *F.P.C.*, 379 F. 2d 153 (1967).

Thus, the Commission's authority to decline to order refunds is clear, and Ellwood has cited no case that denies the existence of this authority.

The remaining question is whether there are equities sufficiently favoring Penn Power to warrant excusing its failure to make timely filings of its rate changes during the period with which we are here concerned.

In 1938 Penn Power had no generating facilities of its own. It purchased electric power from Ohio Edison in Ohio and supplied it to its customers in Pennsylvania. At that

time it was making clearly jurisdictional sales to its wholesale customers. When called upon to file its wholesale rate schedule in that year it did so.[6] But in 1939 it completed a generating unit located within the State of Pennsylvania. It then began to supply its customers with commingled energy, some generated within the State and some brought in from Ohio.

At this time Penn Power believed, as apparently did many others in the electric utility industry, that, in the case of such commingling, federal jurisdiction did not attach.[7] It is too late in the game to probe in depth the reason for, or extent of, this belief. It is sufficient here to note that the Commission took cognizance of it and issued a policy statement that it did "not intend on its own motion to initiate any inquiry into past failure to file such schedules [if filed by August 1, 1964]." Order No. 282, 31 FPC 972 (1964). Barring a persuasive countervailing consideration, this policy statement should be sufficient justification for a decision against ordering Penn Power to make refunds.

But Ellwood raises two objections. First, Order No. 282 expressly stated that it was being issued in response to inquiries from utilities "as to the manner in which the Commission would expect to treat filings made with it of existing wholesale sales *which had not previously been filed* with this Commission." (Emphasis added.) Ellwood argues that Penn Power's 1938 filing placed it beyond the reach of this Order. I disagree. Penn Power had not made

[6] Its failure to do so earlier is not challenged here.

[7] For example, it was argued to the Commission that "in an interconnected electric system with several generating resources, and numerous loads, it is impossible to identify the electric energy delivered to a particular load." *City of Colton, California* v. *Southern California Edison Company*, 26 FPC 223, 230 (1961). The Commission analyzed the energy flows and concluded that out-of-state energy reached the Colton load. 26 FPC at 231.

filings of its "existing wholesale sales" with the Commission, which is why Ellwood filed its complaint. In any event, in my opinion, it is a fair reading that the Order was intended to encourage the filing of all rate schedules and changes therein that were required to be, and had not theretofore been, filed.

Ellwood's second point is that Order No. 282 noted that it could not "prejudge the possible rights of interested third parties" and that it would be put into effect "in the absence of valid objection by any interested party." Ellwood's position that its mere objection is sufficient to negate the order overlooks the qualifying "valid." To be valid the objection must be supported. Reliance on the filed-rate rule and claiming an absolute entitlement to refunds, as Ellwood does, are not, in my judgment, valid objections. If the Commission had not had the power to decline to order refunds, its order would have been a nullity. Order No. 282 plainly served notice that it intended, if it found it to be appropriate, to predate the effectiveness of late filings. Obviously, by doing so, it would eliminate the question of refunds.[8]

There is nothing in the record to support Ellwood's objection, no claim of prejudice to Ellwood nor of unjust enrichment of Penn Power. There is nothing to suggest that Penn Power's failure to make the required filings prior to 1964 was the result of an intent to flout the law or avoid regulation. The fact is that Penn Power made what seem to have been requisite filings with the Pennsylvania Commis-

[8] Ellwood relies on the fact that in the *Colton* case the Commission, in effect, ordered refunds, holding that Southern California Edison's failure to file its rates did not prevent the Commission's "jurisdiction from attaching". 26 FPC at 232, 235. This decision, however, preceded the court litigation, after the conclusion of which the Commission issued Order No. 282. Whatever general applicability the earlier decision might have had, it was plainly superseded by Order No. 282.

sion, where it apparently thought jurisdiction lay. And, presumably, Ellwood thought so, too, since at no time during the period during which it claims it was overcharged, did it challenge the Pennsylvania Commission's jurisdiction or take any steps to have this Commission assert its jurisdiction. And, even assuming *arguendo* that the rate-filing principles and criteria of the Pennsylvania Commission are more generous to utilities than those of this Commission, there is nothing in the record to suggest that the rates proposed by Penn Power and approved by the Pennsylvania Commission reached the limit of its criteria or exceeded those of this Commission.

I must conclude, therefore, that to impose a refund requirement upon Penn Power would be inequitable and it would also be discriminatory, since it would, without good cause, exclude Penn Power from the benefit of Order No. 282, which was intended to apply to all like late filers.

This conclusion obviates the need for reconstruction of the past,[9] which, however, in my view, would be in order even if the appropriateness of requiring refunds were still open. Nevertheless, I am fortified in my conclusion that refunds should not be required by the cursory view of the past presented by the evidence. The claimed overcharges in substantial part stem from Penn Power's failure to continue to allow the discount beyond the date when, under the contract, it was to terminate. In attempting to reconstruct the past we must put aside the failure to comply with the filing requirement and seek to determine, as best we can, whether the rates in effect at the time would have been held to be just and reasonable, if appropriate filings had been made. All other considerations apart, there is nothing in the

[9] *Plaquemines* does not compel such reconstruction. The case turned on the Commission's failure, having undertaken to reconstruct the past as to part of the period of delay, to do so as to the rest of the period. But the case leaves no doubt as to the propriety of reconstruction in the Commission's discretion.

evidence to suggest, and I find no reason to suppose, that Penn Power would not have been permitted to discontinue the discount allowance after its termination date.

Penn Power's reliance on higher fuel costs is in a somewhat different category. The company has shown that, taking the rate filed with FPC in 1938 (including the discount) as being in effect throughout the period for which the filings were required but not made, and adding thereto a fuel adjustment computed in accordance with FPC standards (Exh. 17), the total revenue for the period would be only some $30,000 less than Penn Power actually received from Ellwood (Tr. 41-42, Exh. 16). The problem is that the contract filed in 1938 had no fuel adjustment clause and it is not known as of what date, if at all, FPC would have authorized the use of such a clause. Penn Power's computation of a fuel adjustment every year from 1940 through the first 8 months of 1964 must therefore be taken with this caveat. Nevertheless, the Court in *Plaquemines, supra,* recognized the difficulty of achieving precision in reconstructing the past and made it a point to note that the Commission has "the equitable power to recreate the past, *insofar as reasonably possible.*" (Emphasis supplied.) 450 F. 2d at 1337-1338.[10]

As against Ellwood's claimed overcharges of $312,000 are Penn Power's claimed offset of $119,000 resulting from termination of the discount plus an amount of $280,000, representing the additional fuel adjustment that Penn Power asserts it might have been entitled to (Tr. 4). The latter figure may be reduced substantially without leaving a significant residue, if indeed any, of the amount Ellwood claims to have been overcharged. Granting the imprecision, I am

[10] Although the Court focused on situations in which the reconstruction of the past might be impossible because of lack of essential data or might be too burdensome financially (450 F. 2d at 1338, n. 13), the Court clearly also approved approximate reconstructions.

nevertheless satisfied that, even if a reconstruction of the past were required or deemed appropriate, it would show no substantial overcharges by Penn Power, justifying the ordering of refunds.

We come now to the motions by Ellwood and Penn Power to strike some or all of the other's evidence. The testimony supports Ellwood's Exhibit 15, which shows the claimed overcharges. Penn Power attacks the evidence of the alleged overcharge based on the discontinuance of the allowance, asserting that the predecessor to Section 35.15 of the Commission's Rules of Practice and Procedure (in effect at the relevant time) did not require the filing of a change which resulted from the alleged self-executing termination of a provision such as the discount allowance. Therefore, says Penn Power, even under the filed-rate doctrine, the discontinuance of the allowance without filing therefor did not constitute an overcharge.

Ellwood argues against Penn Power's evidence as to the reconstruction of its past rates [11] that it is irrelevant under the rigid requirements of the filed-rate doctrine.

The rationale of my decision, however, is that the filed-rate doctrine is not applicable here, the question being whether the equities favor Penn-Power and whether, therefore, the Commission, in the exercise of its discretion, should refrain from ordering refunds. In this light, it could be said that both the Ellwood and Penn Power testimony could be dispensed with. But, since what we have here is not solely a legal question as to whether the Commission has discretion, but also whether it should exercise it, the record should show the basis both of the claimed overcharges and of the claimed offsetting amounts as reconstructed. The what and why of claimed refunds and offsets

[11] Penn Power's witness testified to the amount by which the discount and the fuel adjustments would have exceeded the claimed overcharges.

are, in my opinion, relevant to the exercise of discretion; without them the exercise is performed in a vacuum, which it is the nature of reviewing bodies to abhor.

ORDER

WHEREFORE, IT IS ORDERED, subject to Commission review, that:

A. The aforesaid motions of Pennsylvania Power Company and Borough of Ellwood City, Pennsylvania, are denied.

B. The petition of Borough of Ellwood City, Pennsylvania, is dismissed.

/s/ ISRAEL CONVISSER
Israel Convisser
Presiding Administrative Law Judge

APPENDIX B

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: Richard L. Dunham, Chairman; Don S. Smith, John H. Holloman III, and James G. Watt.

Pennsylvania Power Company) Docket No. E-7317

ORDER AFFIRMING INITIAL DECISION
OF ADMINISTRATIVE LAW JUDGE

(Issued March 8, 1977)

This proceeding arose from a complaint and petition for investigation under Section 306 of the Federal Power Act filed by the Borough of Ellwood City, Pennsylvania (Ellwood) alleging that the Pennsylvania Power Company (Penn Power) had overcharged the City for wholesale electric power service between December 12, 1939, to September 3, 1964. Basically the complaint is based on an argument by Ellwood to the effect that any rate changes not filed with the Federal Power Commission by Penn Power during the period in question were invalid under the filed rate doctrine and any monies collected under them should be refunded to Ellwood regardless of the circumstances.

Basically the background facts are as follows. In 1935, Penn Power entered into a contract to supply electricity to the City of Ellwood at wholesale for a period of five years until 1940. At that time Penn Power purchased all of its electric power from the Ohio Edison Company and had no generation of its own. Since all of the power used by Penn Power was transmitted from the State of Ohio to the State of Pennsylvania the Commission in 1938, requested Penn Power to file its wholesale contracts. Pursuant to the Commission's request Penn Power in 1938, filed its contracts for the sale to Ellwood with this Commission. In 1939, Penn Power constructed generating facilities of its own within

the State of Pennsylvania and sufficient to meet the needs of all of its wholesale customers. Penn Power did however maintain an inter-connection with Ohio Edison and did purchase power from Ohio Edison from time to time. Because of its generating facilities operating in Pennsylvania Penn Power believed it was no longer subject to the jurisdiction of this Commission and made no further rate change filings with the Commission. Penn Power did file all of its rates and all rate changes with the Pennsylvania Public Utility Commission and all of its rates were approved by that Commission from time to time.

In 1964, in the so called *Colton* case the Supreme Court determined in *F.P.C.* v. *Southern California Edison Company,* 376 U.S. 205, that a utility interconnected with an interstate source of power regardless of its own generating facilities was subject to F.P.C. jurisdiction. On April 21, 1964, in Order No. 282, 31 FPC 972, the Commission issued a policy statement with respect to rate filings required under the *Colton* decision wherein the Commission held that if filings were made on or before August 1, 1964, it would give consideration to making the schedules effective as of an earlier date. Pursuant to this order Penn Power, along with many other utilities, filed its rates with the Commission. On October 21, 1966, Ellwood filed a complaint here in issue and on November 12, 1973, the Commission ordered a hearing on the complaint. That hearing was held on August 20, 1974, and on April 15, 1975, Presiding Administrative Law Judge Israel Convisser issued his initial decision generally holding against the claim of the City of Ellwood. The Judge primarily based his decision on the ground that the Commission is not bound by the filed rate doctrine and that in any event a reconstruction of the past as ordered by the District of Columbia Court of Appeals in the *Plaquemines Oil and Gas Company* v. *F.P.C.,* 450 F. 2d 1334 (1971), would show that there were probably no overcharges involved.

Based on the entire record in the case, the parties' briefs, the Judge's decision and the exceptions and replies thereto, we find that the Administrative Law Judge was correct in his decision and it should be upheld in all respects. In its exceptions to the Judge's decision Ellwood basically argues that the filed rate doctrine applies to this Commission and that there is no flexibility under it which would give the Commission any discretion to deny refunds. Ellwood also contends that in any event Penn Power had no reason to assume it was nonjurisdictional during the period in question and that because of the inflexibility of the filed rate doctrine the evidence as to reconstructing the past is irrelevant and should be stricken. All of these exceptions are opposed by both Penn Power and the Staff of the Federal Power Commission.

The decision by the Commission in Order No. 282 to accept rate filings by electric utilities following the Supreme Court decision on the *Colton* case was consistent with, and similar to the decision following the *Phillips* case.[1] The position taken by the Judge, Penn Power and Staff are especially supported by the Court decisions in *Niagara Mohawk Power Corp.* v. *F.P.C.*, 379 F. 2d 153 (D.C. Cir. 1967), and *Plaquemines Oil and Gas Company* v. *F.P.C.*, 450 F. 2d 1334 (D.C. Cir. 1971).

Ellwood has also argued that even if we were to assume the Commission has discretion it should not be exercised in this case because Penn Power had no reason to assume it was nonjurisdictional having already made one filing with the Commission in 1938, of a contract which automatically expired in 1940. We agree with the Judge in his finding that

[1] *Phillips Petroleum Company* v. *Wisconsin*, 347 U.S. 672, where it was held that producers of natural gas were subject to federal regulation. Following this decision the Commission put out its Order No. 174, wherein it determined that the contract rates in effect as of the date of the Supreme Court decision should be filed as initial producer rates.

Ellwood's position is incorrect. When Penn Power made its filing in 1938, it was purchasing all of its power from out of state and was clearly jurisdictional. However, when Penn Power installed sufficient generation within the state to cover its wholesale customers it took on the position of many other utilities in the country including *Southern California Edison* who also took this position. It was not until the Supreme Court decision in the *Colton* case (which reversed a Circuit Court decision) that it became clear to these companies that they were jurisdictional and should make filings with the Commission. In compliance with Order No. 282, Penn Power did so. Previous to that Penn Power had filed all of its rates and all of its changes with the Pennsylvania Commission making it clear that it was not trying to avoid regulation but simply had picked the wrong forum.

While the Judge in this case based his decision primarily on his determination that the Commission has discretion in ordering refunds under the filed rate doctrine, he also discussed the court holding in the *Plaquemine* case. If the Commission wishes to reconstruct the past it should do so and "to regard its being done that which should have been done". Ellwood objected to the admission of testimony by Penn Power as to what the rates would have been had it made proper filings with the Commission over the years. While the Judge did not make specific findings as to what the rates would have been, he indicated that the evidence indicated that had the proper filings been made the rates to Ellwood would have been higher than they actually were. The Judge generally based this finding on the fact that a discount granted by the 1935 contract automatically terminated in 1940, and would not have been available. He also found that there was a good chance that if a fuel adjustment clause would have been filed it would have more than offset the claimed overcharges. The Commission Staff agrees that certainly the discount should have been discontinued in any reconstruction of the past rates and takes no position on whether Penn Power would have in fact filed a

fuel adjustment charge. Penn Power based the fuel adjustment charge on one that would have been consistent with the Commission regulations authorizing such charges.

Ellwood has also taken exception to the Judge's refusal to grant its motions to strike the evidence of Penn Power with regard to reconstruction since under the theory of Ellwood it is entitled to full refunds under the filed rate doctrine and evidence as to reconstructing the rates would be irrelevant. We agree with the Judge that knowledge as to the claimed refunds and offsets is relevant to the exercise of our discretion in denying refunds.

The Commission orders:

(A) The initial decision of the Presiding Administrative Law Judge in this proceeding dismissing the petition and denying motions is affirmed.

(B) All exceptions to the decision of the Presiding Administrative Law Judge are denied.

By the Commission.

(SEAL)

Kenneth F. Plumb,
Secretary.

APPENDIX C

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: Richard L. Dunham, Chairman; Don S. Smith, John H. Holloman III, and James G. Watt.

Pennsylvania Power Company) Docket No. E-7317

ORDER DENYING REHEARING

(Issued April 29, 1977)

On March 8, 1977, in this proceeding we issued an Order Affirming Initial Decision of Administrative Law Judge wherein he had found that the Borough of Ellwood City is not automatically entitled to refunds for a period from 1939 to 1964 during which Pennsylvania Power Company failed to make rate filings with the Commission under the assumption that it was nonjurisdictional. Ellwood City had contended that under the filed rate doctrine the Commission has no discretion at all in the ordering of refunds for any rate changes which were not timely filed with the Commission regardless of the reason for their nonfiling.

On April 6, 1977, the Borough of Ellwood City filed an application for rehearing generally reasserting arguments presented to the Administrative Law Judge and this Commission prior to the earlier orders. The legal principals cited by the Borough of Ellwood City in its application for rehearing are the same as those cited to the Administrative Law Judge and this Commission and were fully considered prior to the issuance of our order affirming the initial decision of the Administrative Law Judge. We will therefore reaffirm our order of March 8, 1977, in this proceeding and deny the application for rehearing.

The Commission finds:

The assignments of error and grounds for rehearing set forth in the application filed by the Borough of Ellwood City, Pennsylvania, in this proceeding on April 6, 1977, present no facts or legal principals which would warrant any change in or modification of the Commission's order issued March 8, 1977.

The Commission orders:

The application for rehearing and request for reopening filed by the Borough of Ellwood City April 6, 1977, in this proceeding is hereby denied.

By the Commission.

(SEAL)

Kenneth F. Plumb,
Secretary.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 77-1690

BOROUGH OF ELLWOOD CITY, *Petitioner*

v.

FEDERAL ENERGY REGULATORY COMMISSION, *Respondent*

PENNSYLVANIA POWER COMPANY, *Intervenor*

PETITION FOR REVIEW
FEDERAL ENERGY REGULATORY COMMISSION

Argued March 27, 1978

(Opinion filed August 8, 1978)

Before: ALDISERT, GIBBONS and HIGGINBOTHAM,
Circuit Judges

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OPINION OF THE COURT

HIGGINBOTHAM, *Circuit Judge.*

The Borough of Ellwood City (Ellwood) has petitioned this court, pursuant to Section 313(b) of the Federal Power Act, 16 U.S.C. § 8251(b), to review an order of the Federal Power Commission[1] denying Ellwood refunds from the Pennsylvania Power Company (Penn Power) for the period 1939 to 1964. Ellwood claims that it is entitled to those refunds because it made payments to Penn Power for electrical energy in excess of the rates filed with the Commission governing such sales. We will affirm the order of the Commission.

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[1] Pursuant to the provisions of the Department of Energy Organization Act, Public Law 95-91, 42 U.S.C. § 7101 (August 4, 1977) and Executive Order No. 12009, 42 Fed. Reg. 46267 September 13, 1977, the Federal Power Commission ceased to exist on September 30, 1977. The Federal Energy Regulatory Commission, to which most of the FPC's powers have been transferred, has been substituted as a party to this case pursuant to Section 705(e) of the Organization Act, 42 U.S.C. § 7295(e). Reference to the Commission, in the context of actions before October 1, 1977, is to the FPC. Reference to the Commission in the context of actions thereafter is to the Federal Energy Regulatory Commission.

I. *The History of the Proceedings*

This case is vivid illustration of Mr. Justice Holmes' maxim, "[A] page of history is worth a volume of logic."[2] Only after one understands the history of the relationship between Penn Power, Ellwood, the Federal Power Commission and the Pennsylvania Public Utilities Commission does one recognize that the surface logic of Ellwood's contention leads to a conclusion inconsistent with the relevant statutes and the principle of consumer protection those statutes embody. The complexity of this case has been accentuated by Penn Power's having been lulled for over 25 years into believing that the Commission had no jurisdiction over the sales in question. Penn Power is not to be faulted for this belief, since the Commission itself assumed it was without jurisdiction over these transactions. During the period in which Penn Power did not file with the Commission, it did not operate without regulation. Its rates were reviewed by the Pennsylvania Public Utilities Commission which considered itself to have jurisdiction over these sales. Thus Ellwood is now demanding that the Commission order refunds on the basis of sales that the Commission had initially considered beyond its jurisdiction and which the Pennsylvania Public Utilities Commission had considered within its scope of authority.

With the preceding as introduction, we will now detail the history that has so far only been alluded to. That history begins on November 8, 1934, when Ellwood and Penn Power entered into a five-year contract for the sale of electricity to begin on December 1, 1935.

In October 1938, the Commission directed Penn Power to file the above agreement. Later that month, Penn Power sent to the Commission a rate schedule covering the sales to Ellwood. In November 1938, the Commission replied that the filing of this rate schedule did not comply with the

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[2] New York Trust Co. v. Eisner, 256 U.S. 345, 349 (1921).

Commission's request and directed Penn Power to file the agreement itself. In December 1938, Penn Power complied with this request. The Commission informed Penn Power in October 1939, that the 1935 agreement with Ellwood was numbered Pennsylvania Power Company Rate Schedule FPC No. 6 and was given an effective date of December 1, 1935. Later that month Penn Power acknowledged receipt of this information.

Prior to 1939, Penn Power purchased all of its energy from an out-of-state affiliate. In 1939, it began generating power in Pennsylvania although it also continued to buy power from its out-of-state affiliate. Because Penn Power's within-state generating capacity was sufficient to meet the demands of Ellwood and its other Pennsylvania wholesale customers, it considered itself subject to regulation by the Pennsylvania Public Utilities Commission (PUC) rather than the FPC. Rate changes were therefore filed with the PUC. Ellwood participated in some of these PUC proceedings.

In 1964, the Supreme Court decided the *Colton* case, *FPC v. Southern California Edison Co.*, 376 U.S. 205 (1964). In that case, the Court held that sales of power by a California utility to the City of Colton were subject to Commission jurisdiction because some of the power came from out of state. The utility there, like Penn Power, also generated power within the state. The Court's holding reversed the Ninth Circuit decision that the Commission did not have jurisdiction because the state regulated the sales and such state regulation was permissible under the Commerce Clause.

The Commission then issued Order No. 282, 31 FPC 972 (1964), which provides in part:

> The Commission has received a number of inquiries from public utilities who are presently engaged in reviewing the status of their wholesale power sales, in the light of the recent Supreme Court decision in the *Colton* case, *Federal Power Commission v. Southern California Edison Company*, 376 U.S. 205, 11 L. ed. 2d 638, decided March 2, 1964, as to the manner in which the Commission would expect to treat filings made with it of existing wholesale sales which had not previously been filed with this Commission. In response to such inquiries the Commission believes it appropriate to advise all public utilities that, while it of course cannot prejudice the possible rights of interested third parties, its primary objective is in insuring that the rate schedules for all jurisdictional sales are promptly filed with this agency, as required by law, and that where such rate schedules are filed with this agency by August 1, 1964, it does not intend on its own motion to initiate any inquiry into past failures to file such schedules.
>
> In accordance with this policy the Commission, in the absence of valid objection by any interested party, will permit all existing rate schedules to be filed as initial rate schedules pursuant to the provisions of Section 35.1(b) of its Regulations under the Federal Power Act and will give favorable consideration to requests pursuant to the provisions of Section 35.11 of these Regulations to make such schedules effective as of the date of filing or such earlier date as the public utility may show is consistent with the public interest, if such filings are made on or before August 1, 1964.

In June, 1964, Penn Power was told that, in the opinion of the Commission's staff, it did not have to refile the initial rate filings including Rate Schedule No. 6 that covered sales to Ellwood. Penn Power did file the past unfiled wholesale rate schedules and the Municipal Resale Service rate schedule which governed sales to Ellwood since March 1960. In September 1964, the Commission notified Penn Power that these schedules were accepted for filing as of August 3, 1964 and that the Municipal Resale Service rate schedule

was designated Supplement No. 4 to Rate Schedule No. 6 and given an effective date of September 3, 1964.

In August 1966, Penn Power and Ellwood entered into a new contract, effective June 1966, which resulted in a rate reduction to Ellwood. This contract was filed with the Commission.

On October 21, 1966, Ellwood filed a complaint against Penn Power under Section 306 of the Federal Power Act, 16 U.S.C. § 825e, seeking the refund of charges collected between December 16, 1939 and September 3, 1964 in excess of the rates set forth in Rate Schedule No. 6. Although the parties had filed a number of responsive pleadings in 1967 and an informal conference between the parties and the Commission's staff was held in 1969, no formal Commission action has been taken by 1973.

On September 11, 1973 Ellwood filed a mandamus action in the United States District Court for the District of Columbia seeking an order compelling the Commission to investigate and take action upon the complaint. In November 1973, the Commission issued an order denying Penn Power's motion to dismiss the complaint and instituting an investigation. The mandamus action was then dismissed without opposition from Ellwood.

A hearing was held before an Administrative Law Judge in August 1974. In April 1975, the ALJ issued his decision dismissing Ellwood's complaint. Ellwood filed exceptions to this decision in May 1975. The Commission affirmed the ALH's decision on March 8 and denied an application by Ellwood for rehearing on April 29, 1977. Ellwood filed its petition for review of the Commission's order on May 27, 1977. Penn Power's request to intervene has been granted.

II. *The Commission's Power to Promulgate the Policy Forgiving Past Failures to File*

We must emphasize the context in which this case is being litigated. The Commission, as a result of the *Colton* decision, for the first time exercised jurisdiction over a large number of intra-state sales of power that had previously been subject only to state regulation. As a practical matter, the Commission was just beginning to regulate these transactions. In theory, however, these sales were always subject to the Commission's jurisdiction. The Commission thus was forced to formulate a policy regarding past as well as future sales. This policy was announced in Order No. 282. Essentially the Commission announced that it would excuse prior failure to file as long as current rates were promptly filed. The Commission, of course, did not foreclose the possibility that some third parties may be entitled to relief as a result of the past failures to file.

The issues confronting us here are whether it is within the Commission's power to promulgate the above policy and, if so, whether that policy may be applied to the sales in question here.

The Commission has promulgated similar policies when it began to exercise jurisdiction over other new categories of transactions. The most closely analogous situation occurred when the Commission first exercised jurisdiction, pursuant to the Supreme Court's decision in *California v. Lo-Vaca Gathering Co.*, 379 U.S. 366 (1965), over sales of any natural gas actually commingled with gas to be resold in interstate commerce.

Although the Commission issued no general order on the subject, the Commission made clear its policy to forgive any failures to file prior to the Commission's own 1961 decision in *Lo-Vaca*.[3] The Commission approved settlements in

[3] Lo-Vaca Gathering Co., 26 F.P.C. 606 (1961).

the *Despot* proceedings that provided for no refunds for the period prior to 1961. *See* 38 F.P.C. 1041 (1967); 39 F.P.C. 232, 472, 555 (1968). In *Hugoton Production Co.*, 41 F.P.C. 490 (1969), the Commission refused to order refunds for pre-1961 sales stating:

> During the first period, before the issuance of *La-Vaca*, we are of the opinion that the doctrine of that case may not have been predictable by many producers. Under the doctrine we determined that sales of gas to a pipeline where the gas sold is commingled with the inter-state stream is jurisdictional, although by contract the producer and pipeline agree that the gas is to be used in the same state or used for compressor fuel and not resold. The Producers might have felt, with some reason, that gas could have been isolated from the jurisdictional gas by contractual means. Therefore, we think as a matter of equity Hugoton should not be required to make a refund for this period.

41 F.P.C. at 497. The Commission also declined to order refunds for pre-1961 transactions in *Plaquemines Oil and Gas Co.*, 43 F.P.C. 620 (1970), *rev'd in part on other grounds and remanded sub. nom., Plaquemines Oil and Gas Co. v. F.P.C.*, 450 F.2d 1334 (D.C. Cir. 1971). Unfortunately the District of Columbia Circuit's opinion in *Plaquemines*, although noting that the pre-1961 failure to file was excused, had no occasion to review the propriety of that action.

Another similar situation arose when the Supreme Court held, in *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672 (1954), that producers and gatherers of natural gas who also transport or sell gas in interstate commerce for resale are subject to the requirements of the Natural Gas Act. In response, the Commission promulgated Order No. 174, 13 F.P.C. 1195 (1954), which was in turn modified by Order No. 174A, 13 F.P.C. 1410 (1954). The Commission

explained the reason for promulgating the order in this way:

> Those producers and gatherers which come within the class found by the United States Supreme Court in the *Phillips* case to be subject to the Commission's jurisdiction should be afforded a reasonable opportunity to comply with the requirements of the Act to the end that the regulatory objectives of Congress may be achieved within the shortest feasible time. Also, in the interest of consumers, natural-gas companies and the public generally, practical considerations require us to deal with current problems which confront us as a consequence of the Court's decision and a reasonable cut-off date should be fixed in order to avoid confusion in attempting to readjust past transactions.

13 F.P.C. 1195. As a result of 174 and 174A, producers and gatherers were considered subject to the filing requirements of the Natural Gas Act only after June 7, 1954, the date of the Supreme Court decision in *Phillips*. In *Cities Service Gas Producing Co. v. F.P.C.*, 233 F.2d 726 (10th Cir. 1956), the court agreed with the Commission that an unfiled rate change made after June 7, 1954 by a company that had recently filed pursuant to Order No. 174A was ineffective. Thus, although the court did not specifically discuss whether the Commission could excuse pre-June 7 failures to file, it did emphasize that the attempted increase there was made after June 7. *Cities Service, supra*, at 730.

A third analogous situation arose involving the requirement of Section 23(b) of the Federal Power Act[4] that licenses be obtained to construct, operate or maintain power projects on navigable water. In the *Androscoggin* case, *Public Service Co. of New Hampshire*, 27 F.P.C. 830 (1962), the Commission predated licenses to begin to run from 1943, the date of earlier Commission decisions that made it

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[4] 16 U.S.C. § 817.

clear that a stream usable for log transport was considered navigable. The significance of the effective date is that 20 years after the effective date each licensee must establish amortization reserves reflecting excess profits. These reserves may be used to reduce the amount which the U.S. must pay to take over the project after the license expires. Thus, the earlier the effective date, the worse for the company involved. By setting an effective date of 1943, the Commission, in effect, excused prior failure to apply for a license. Thereafter, the Commission established a policy of assigning 1962, the date of the *Androscoggin* decision, as the effective date for licenses sought under similar circumstances.[5] In *Niagara Mohawk Power Corp. v. F.P.C.*, 379 F.2d 153 (D.C. Cir. 1967), the court affirmed the Commission's order pre-dating the effective date of such a license to 1962.

In all three situations described above, the Commission formulated policies for commencing the exercise of jurisdiction over previously unregulated transactions. In all three situations, the Commission, as part of its policy, decided to, in effect, excuse non-compliance with the regulatory scheme prior to a certain date. Unfortunately, the validity of this aspect of the Commission's policies has not been subjected to appellate review. In *Plaquemines, Cities Service and Niagara & Mohawk,* companies, who were essentially in the position of Penn Power here, claimed that the Commission had treated them too harshly. In those cases no one complained, as Ellwood does here, that the Commission was unlawfully lenient.

We conclude, however, that the Commission did act lawfully here. No statutory language prescribed the proper treatment for those who have in good faith failed to file.[6]

[5] *See* Niagara Mohawk Power Corp. v. F.P.C., 379 F.2d 153, 157 (D.C. Cir. 1967).

[6] 16 U.S.C. § 825n provides for penalties in the case of *wilful* noncompliance.

Excusing the past failures to file here is justified by several factors. Most significant is that the past failures to file were the result of a widespread misapprehension of the extent of the Commission's jurisdiction. Even the Court of Appeals in *Colton* shared this misapprehension. The failures to file were thus clearly in good faith. Since the companies were not culpable, they should not be punished for technical non-compliance.

Excusing past failures is also an incentive to present compliance. Finally, considerations of administrative practicality preclude requiring the Commission to search decades into the past in order to enforce every failure to comply with the regulatory scheme.

The Supreme Court has instructed us that the Commission "must be free, within the limits imposed by pertinent constitutional and statutory commands, to devise methods of regulation capable of equitably reconciling diverse and conflicting interests." *In re Permian Basin Area Rate Cases,* 390 U.S. 747, 767 (1958). Under these circumstances, we conclude that it was within the Commission's discretion, as part of its method of beginning to regulate the category of transactions in question here, to excuse past failures to file.

III. *The Application of the Commission's Policy to Penn Power*

The question remains, however, whether a different result is required here because Penn Power did file rates in 1938. Ellwood contends that any amount charged in excess of the Rate Schedule No. 6 must be refunded under the filed rate doctrine. The filed rate doctrine is really not so much a judicially created "doctrine" as an application of explicit statutory language.

The doctrine has been applied under several regulatory schemes.[7] It has meant somewhat different things to different circuits. The doctrine has been described as intending "to prevent discriminatory rate payments",[8] as "reflecting a statutory bias in favor of retroactive rate reductions but not retroactive rate increases. . . ." [9] and as being primarily concerned with the "preservation of the agency's primary jurisdiction over reasonableness of rates and the need to insure that regulated companies charge only those rates of which the agency has been made cognizant." [10]

The core of the filed rate doctrine, as it applies to electric utilities, is contained in the following sub-sections of § 205(c, d) of the Federal Power Act, 16 U.S.C. §§ 824d (c) and 824d(d):

> (c) Under such rules and regulations as the Commission may prescribe, every public utility shall file with the Commission, within such time and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.
>
> (d) Unless the Commission otherwise orders, no change shall be made by any public utility in any such

[7] *See* City of Cleveland, Ohio v. Federal Power Commission, 525 F.2d 845, 854 (D.C. Cir. 1976).

[8] Cities Service Gas Co. v. Federal Power Commission, 424 F.2d 411, 417 (10th Cir. 1969), *cert. denied*, 400 U.S. 801 (1970).

[9] Gillring Oil Co. v. Federal Energy Regulatory Commission, 566 F.2d 1323, 1325 (5th Cir. 1978).

[10] City of Cleveland, Ohio v. Federal Power Commission, 525 F.2d 845, 854 (D.C. Cir. 1976).

> rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

The basic principle is simple: Since all rates subject to the Commission's jurisdiction must be filed and filed rates cannot be changed except as provided, utilities must sell their energy at the filed rate. This principle that rates cannot be changed except upon proper filing has been applied even where the initial rates had been agreed to between the parties, *but had not been filed*.[11]

Ellwood's theory is that the rate filed by Penn Power in 1938 based on the 1935-1940 contract was the only rate that Penn Power could charge until its 1964 filing and, therefore, that it is entitled to a refund of all accounts paid

[11] *See* Borough of Lansdale, Pa. v. Federal Power Commission, 494 F.2d 1104 (D.C. Cir. 1974); Natural Gas Pipeline v. Harrington, 246 F.2d 915 (5th Cir 1957), *cert denied*, 356 U.S. 957 (1958); Cities Service Gas Producing Co. v. Federal Power Commission, 233 F.2d 726 (10th Cir. 1956). The provisions of Section 4 of the Natural Gas Act, 15 U.S.C. § 717(c), are essentially the same as those of Section 205 of the Federal Power Act. Cases decided under Section 4 are therefore applicable here. *See* Federal Power Commission v. Sierra Pacific Power Co., 350 U.S. 348-50 (1956).

in excess of that rate. We hold that it is within the Commission's discretion to deny any refund on the facts here.[12]

As the Supreme Court stated in applying the Natural Gas Act, we must examine the details of Ellwood's argument "against the backdrop of the practical consequences of the petitioner's claim and the purpose of the Act. . . ." *Sunray Mid-Continent Oil Co.* v. *F.P.C.*, 364 U.S. 137, 147 (1960). The practical consequence of applying the filed rate doctrine in the manner suggested by Ellwood is that Penn Power would have the rate it charged Ellwood frozen for a period of twenty-four years after the 1935 contract, which set the rate, had terminated. Ellwood claims that it should receive reimbursement in the amount of $312,465.

The purposes of the Act would not be furthered by such a result. The underlying concern of the Act is to assure that the rates subject to its coverage are reasonable and that these rates are set and reviewed in a fair and orderly manner. Penn Power did not escape regulation by not filing with the Commission between 1940 and 1964. Its sales to Ellwood were subject to regulation by the Pennsylvania Public Utilities Commission and all rate increases were filed with that agency.

Thus when Ellwood's argument is viewed against the backdrop of the practical consequences of its claim and the purposes of the Act, the force of the argument is considerably diminished.

With this in mind we now address directly the merits of Ellwood's filed rate contention. Ellwood argues that even if the policy embodied in Order No. 282 of forgiving past failures to file is valid, the sales here are outside the ambit of the policy because Penn Power filed a rate covering such sales in 1938. Presumably, according to this argument, if

[12] The Commission's position is that the filed rate doctrine does not limit its power and that it may always, after balancing the equities, deny refunds of excess charges. We need not decide whether the commission's discretion is indeed this broad.

Penn Power had made a filing which cancelled this rate, the sales here would be within the scope of the policy enunciated in Order No. 282. In 1938, the Commission requested that Penn Power file the agreement on the basis of which the sales to Ellwood were made. Penn Power filed this agreement after being told that the filing of the rate itself was not proper. § 205(d) of the Federal Power Act, 16 U.S.C. § 824d(d) prohibits changes in any "rate charge, classification, or service, or in any rule, regulation or *contract* relating thereto" without proper filing. The contract which was filed here, by its terms, terminated after five years. The current regulation, 18 C.F.R. § 35.15 (1977), requires filing with the Commission before "a rate schedule or part thereof required to be on file with the Commission is proposed to be cancelled or *is to terminate by its own terms.*" As late as 1961, this regulation then numbered 18 C.F.R. § 35.05 referred only to filing cancellations and did not specifically require filing where a contract, as the one here, terminated by its own terms. Since the statute requires filing of *changes,* and there was no change, and since the regulation applicable at the time the contract terminated did not require filing where a contract was terminated by its own terms, Penn Power properly considered the rate it filed in 1938 to be of no effect after 1940. We therefore hold that there was no effective filed rate applicable to the sales in question and, as a result, the filed rate doctrine is not applicable.

An alternative basis for this conclusion is that the filed rate doctrine provides no basis for distinguishing between companies who filed rates in the past and those who did not file at all. As already discussed, courts have held that where the Commission has jurisdiction over given sales and the parties have agreed to a certain rate, that rate may not be increased without prior filing even though the initial rate was never filed.[13] Ellwood therefore has no greater claim

[13] See note 11, *supra.*

to a refund than does any other purchaser whose supplier's past failure to file is excused pursuant to Order No. 282. Thus if the Commission has the discretion under those circumstances to excuse past failures to file and we have just held that it does, the filed rate doctrine imposes no special obstacle to the exercise of that discretion with respect to Penn Power here.

The order of the Commission will, therefore, be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit

(A.O. U. S. Courts, International Printing Co., Phila., Pa.)

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 77-1690

BOROUGH OF ELLWOOD CITY, *Petitioner,*

v.

FEDERAL ENERGY REGULATORY COMMISSION, *Respondent,*

PENN POWER COMPANY, *Intervenor*

SUR PETITION FOR REHEARING

PRESENT: SEITZ, Chief Judge, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS, GARTH and HIGGINBOTHAM, Circuit Judges.

The petition for rehearing filed by BOROUGH OF ELLWOOD CITY, Petitioner in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is denied.

By the Court,
/s/ A. LEM HIGGINBOTHAM
Judge

Dated: September 13, 1978

CERTIFICATE OF SERVICE

I hereby certify that I have this 12th day of December, 1978, served three (3) copies of the foregoing document by first class mail and with postage prepaid upon the following:

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No. 78-945

In the Supreme Court of the United States

OCTOBER TERM, 1978

BOROUGH OF ELLWOOD CITY, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

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MEMORANDUM FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

Petitioner, a Pennsylvania municipality that has purchased electric power for many years from respondent Pennsylvania Power Company, contends that the Federal Power Commission [1] erred in failing to order Penn Power to refund $312,000 to petitioner

[1] The Federal Energy Regulatory Commission has succeeded to the responsibilities of the former Federal Power Commission in this case under the Department of Energy Organization Act, Pub. L. No. 95-91, 91 Stat. 565. In this brief, "Commission" refers to either body as required by the context.

for alleged overcharges from 1939 to 1964 in sales of power that this Court in 1964 held were subject to the Commission's jurisdiction.

1. In 1935 Penn Power entered into a five-year contract to sell electricity to petitioner that was generated by a Penn Power affiliate in Ohio. In 1938, at the Commission's request, Penn Power filed that contract and a corresponding rate schedule with the Commission. The filing was required by the Commission because at that time all of the power sold to petitioner was from out-of-state and because Section 205(c) of the Federal Power Act, 16 U.S.C. 824d(c), requires utilities selling electricity at wholesale in interstate commerce to file their rates and contracts with the Commission.

In 1939 Penn Power began operating plants in Pennsylvania that produced enough power to furnish all of the electricity sold by Penn Power at wholesale to municipalities in Pennsylvania. However it continued to obtain some of its power from its Ohio affiliate. From 1939 to 1964 Penn Power assumed that the sales to petitioner were no longer subject to the Commission's jurisdiction, and accordingly filed all of its subsequent rate schedules and changes with the Pennsylvania Public Utilities Commission rather than with the Commission. Petitioner apparently shared that assumption, since it never complained of Penn Power's rates until it commenced this action in 1966.

In 1964 this Court in *FPC* v. *Southern California Edison Co.*, 376 U.S. 205 (*Colton*), held that sales

of electricity at wholesale that occur entirely within a state are subject to the regulatory requirements of the Federal Power Act if some of the energy, even a small part, comes from out-of-state.

Following the *Colton* decision, the Commission issued a policy statement, Order No. 282, 31 F.P.C. 972 (1964), advising utilities in Penn Power's situation that if they filed appropriate rate schedules with the Commission by August 1, 1964, it would treat such filings as initial rate schedules, subject to Section 205(c) (rather than as changes in existing rates) and that "it does not intend on its own motion to initiate any inquiry into past failures to file such schedules" (Pet. App. 27a). The Commission cautioned, however, that its policy was to be without prejudice to the possible rights of interested third parties. *Ibid.*

Like many other utilities, Penn Power filed with the Commission the schedules it had previously filed with its state regulatory commission. The Commission accepted Penn Power's then current schedules for filing effective as of September 3, 1964 (Pet. App. 2a-3a).

2. In 1966 petitioner complained to the Commission that the only lawful rates in effect from 1939 to 1964 were those set forth in the contract and rate schedule Penn Power had filed with the Commission in 1938, and demanded refunds for the difference between those rates and the rate actually charged during that period. Petitioner based its claim on Section 205(c) of the Federal Power Act, 16 U.S.C.

824d(c), which requires the filing of rate schedules for jurisdictional sales, and on Section 205(d), 16 U.S.C. 824d(d), which provides "[u]nless the Commission otherwise orders, no change shall be made by any public utility in any such rate * * * except after thirty days' notice to the Commission and to the public." Petitioner also relied generally on the "filed rate doctrine," which those sections reflect, under which utilities and their customers "can claim no rate as a legal right that is other than the filed rate, whether fixed or merely accepted by the Commission, and not even a court can authorize commerce in the commodity on other terms." *Montana-Dakota Utilities Co.* v. *North-Western Public Service Co.*, 341 U.S. 246, 251 (1951).

After a hearing before an administrative law judge, who entered an initial decision rejecting petitioner's claims (Pet. App. 1a-15a), the Commission held that it had discretion to refuse to order a refund in the circumstances, and that the equities of the case warranted denial of Ellwood's claim (Pet. App. 16a-22a). The court of appeals affirmed in a thorough opinion on which we primarily rely (Pet. App. 23a-38a).

3. The court of appeals correctly rejected petitioner's claims that the filed rate doctrine required the Commission to order refunds in the unique circumstances of this case.

This case involves the situation that arises from time to time in which a judicial decision establishes an agency's jurisdiction over transactions that were

reasonably thought to be exempt from jurisdiction before the decision.[2] Petitioner does not dispute that from 1939 to 1964 Penn Power reasonably believed that its sales to petitioner were not subject to Commission jurisdiction (Pet. 8). It is true that in 1938 Penn Power filed its rate schedules with the Commission because it was then furnishing electricity obtained from out-of-state. But in 1939 it (and petitioner) reasonably believed that its sales ceased to be within the Commission's jurisdiction because all of the power sufficient to meet petitioner's needs was generated within Pennsylvania.

The purposes of the "filed rate doctrine" on which petitioner relies do not apply to the rather unusual situation in which jurisdiction over transactions is subsequently recognized in a judicial decision. Rather,

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[2] In those situations the Commission has, as it did here, adopted policies forgiving past failures to file if regulated companies promptly complied with the law as clarified. See, *e.g.*, Order Nos. 174 and 174-A, 13 F.P.C. 1195, 1410 (1954), implementing this Court's decision holding that producers' sales of natural gas in interstate commerce were subject to the Natural Gas Act (*Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672 (1954)); *Hugoton Production Co.*, 41 F.P.C. 490 (1969), implementing this Court's holding that local gas commingled in the interstate stream is subject to the Commission's jurisdiction even if sold locally (*California* v. *Lo-Vaca Gathering Co.*, 379 U.S. 366 (1965)); *Niagara Mohawk Power Corp.* v. *FPC*, 379 F.2d 153 (D.C. Cir. 1967), affirming the Commission's decision to predate hydroelectric licenses applied for under a 1962 Commission ruling (*Public Service Co. of New Hampshire*, 27 F.P.C. 830) that existing hydroelectric projects on streams usable for log transport require licenses under Part I of the Federal Power Act.

that doctrine and all of the cases cited by petitioner applying it pertain to transactions over which an agency's regulation was always recognized. Under that doctrine, for example, if a railroad files a tariff with the Interstate Commerce Commission and subsequently contracts to carry freight at higher rates without filing a new tariff, the shipper may obtain a refund of the charges in excess of the filed rate, even if the higher rates were negotiated at the shipper's instigation and even if they were just and reasonable. Although it may be harsh in some cases, the courts have held that that result is required by the policy of the statute, which would be thwarted if parties could circumvent statutory procedures unilaterally or by private agreement.

The objectives of the Federal Power Act, or similar statutes, do not require application of the filed rate doctrine when, as here, a change in law establishes jurisdiction over the transactions after the fact. In such circumstances, the court of appeals correctly held that an agency has discretion to hold that the previous failure of utilities to make appropriate filings does not require sanctions or refunds;[3]

[3] Imposing sanctions or refunds retroactively to transactions that were legally outside the Commission's jurisdiction at the time (or reasonably believed to be so) would not serve the statutory purpose of preventing persons from circumventing statutory procedures unilaterally or by private agreement. Nor would it serve the basic purpose of Part II of the Federal Power Act of ensuring just and reasonable rates to the consumer, since there is no reason to suppose that the Commission would have rejected the schedules that Penn Power filed

nor does petitioner appear to question that principle. See, *e.g.*, *Permian Basin Area Rate Cases*, 390 U.S. 747, 767 (1968), noting the Commission's discretion "to devise methods of regulation capable of equitably reconciling diverse and conflicting interests."

Contrary to petitioner's contention, however, the happenstance that Penn Power had filed a rate schedule in 1938 is immaterial and does not require a different result. Penn Power did not file any schedules with the Commission after 1939 (to either change or cancel its schedule filed in 1938) because it reasonably believed that its sales after 1939 were not subject to the Commission's jurisdiction and were subject only to the jurisdiction of the state commis-

with the state commission and since, during this period, the state commission did exercise regulatory jurisdiction over the rates. In some cases, it may be necessary to give retroactive application to a change in law. See generally *Retail, Wholesale and Department Store Union* v. *NLRB*, 466 F.2d 380, 388-391 (D.C. Cir. 1972). But the Commission was well within its discretion in concluding that the purpose served by the filed rate doctrine—ensuring compliance with statutory procedures—did not require refunds in the circumstances of this case.

The circumstances of this case, in which a judicial decision can be viewed as changing the law and expanding the Commission's jurisdiction over transactions that were reasonably thought to be exempt from jurisdiction, are quite different from cases in which a person's failure to act as the statute requires is assertedly based on an ordinary mistake of fact or law. If a railroad, for example, charges rates in excess of its filed rate, it is no defense that it mistakenly believed that it was not required to file a tariff for the higher rates, or that it believed that the Interstate Commerce Commission would have approved such a higher tariff if it had been filed.

sion. It was thus in the same situation as any other utility during the period 1939-1964 making the same kind of sales that had never filed a tariff with the Commission. The Commission had discretion to hold that Penn Power, like such other utilities, was not required to pay refunds because of its reasonable, though subsequently rejected, belief that its sales were not within the Commission's jurisdiction.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1979

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-945

BOROUGH OF ELLWOOD CITY,

Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
PENNSYLVANIA POWER COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENT PENNSYLVANIA POWER COMPANY IN OPPOSITION

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January 31, 1979

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BRIEF FOR RESPONDENT PENNSYLVANIA POWER COMPANY IN OPPOSITION

Orders and Opinions Below

The initial decision of the Presiding Administrative Law Judge dismissing the complaint of the Borough of Ellwood City, Pennsylvania for recovery of alleged overcharges, issued April 15, 1975, in Federal Power Commission Docket No. E-7317, *Pennsylvania Power Company*, is set forth in Petitioner's Appendix A at 1a. The March 8, 1977 order of the Commission affirming this decision is set forth in Petitioner's Appendix B at 16a. The Commission order of April 29, 1977 denying a rehearing is set forth in Petitioner's Appendix C at 21a. The Court of Appeals opinion

of August 8, 1978 affirming the Commission's order is in Petitioner's Appendix D at 23a and is reported at 583 F.2d 642 (3d Cir. 1978). The order of the Court of Appeals on September 13, 1978 denying a rehearing is set forth in Petitioner's Appendix E at 39a.

Jurisdiction

The jurisdictional prerequisites are set forth in the Petition.

Question Presented

Did the United States Court of Appeals correctly decide that the Federal Power Commission had discretion to excuse the Pennsylvania Power Company for its good faith failure to file rate schedules during the period from 1939 until 1964 when the Federal Power Commission did not assert its jurisdiction over the underlying transactions?

Statutes Involved

Section 205(c), (d) of the Federal Power Act, 16 U.S.C. § 824d(c), (d), is set forth in the Petition, at pp. 3-4. Section 309 of the Federal Power Act, 16 U.S.C. § 825(h), states in pertinent part:

> "The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this chapter."

Statement of the Case

Petitioner, Ellwood City, is a municipality in Pennsylvania which purchases electric power at wholesale from Respondent, Pennsylvania Power Company (the "Company" or "Penn Power"). In 1935, the Petitioner began

a five-year contract with the Company. At that time, the Company had no generation of its own and purchased all of its electric power across state lines from the Ohio Edison Company. The Company, as well as the Pennsylvania Public Utility Commission (the "PPUC"), believed that such sales were subject solely to state jurisdiction. This view was based upon Section 201(a) of the Federal Power Act, 16 U.S.C. § 824(a), which provided for federal regulation "to extend only to those matters which are not subject to regulation by the States."

Nonetheless, in 1938 the Federal Power Commission (the "Commission" or "FPC") directed the Company to file with the Commission its 1935 contract with Petitioner.[1] The Company complied and the contract was denominated "Pennsylvania Power Company Rate Schedule FPC No. 6" with an effective date of December 1, 1935. Petitioner's App. D at 25a-26a.

In 1939, the Company constructed its own generating plant within the State of Pennsylvania with sufficient capacity to meet the needs of all of its wholesale customers, including Ellwood City. Although the Company remained interconnected to the Ohio Edison Company, it believed, until 1964, that its sales at wholesale did not constitute interstate sales of wholesale power within the meaning of the Federal Power Act.[2] Accordingly, during the period in question, whenever the Company sought changes in its rates, it made filings with the PPUC rather than the FPC.[3]

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1. The Federal Power Commission was replaced by the Federal Energy Regulatory Commission ("FERC" or "Commission") as of October 1, 1977. For purposes of this brief, the "Commission" when used in the context of action taken prior to October 1, 1977, refers to the FPC; otherwise, "Commission" refers to the FERC.

2. Many other electric untilities took similar positions regarding their own wholesale sales. Petitioner's App. B at 19a.

3. The Company also made informational filings with the Commission which reflected changes in its rates as established by the PPUC.

All rates charged from 1939 to 1964 were approved by the PPUC and Ellwood City either participated in or had an opportunity to participate in all relevant proceedings before the PPUC.

In 1964, this Court decided *Federal Power Commission* v. *Southern California Edison Co.*, 376 U.S. 205 (1964), (the *Colton* case), which affirmed Commission jurisdiction over wholesale power sales within a state when any part of the in-state utility's energy came from out-of-state. The Federal Power Commission thus was held to have had jurisdiction since the passage of the Federal Power Act over virtually all wholesale sales of electric power.

In response to inquires from many utilities about the status of FPC regulation of wholesale power sales, the Commission issued Order No. 282, 31 F.P.C. 972 (1964), in which the Commission stated that it did "not intend on its own motion to initiate any inquiry into past failures to file such schedules" as long as utilities filed their then current rates by August 1, 1964. *Id.* at 973.

Pursuant to Order No. 282, the Company filed its then current wholesale rates with the Commission. The Company was informed by the Commission that it did not have to file any past unfiled rate schedules. In September of 1964, the Company was notified that its then current rates were accepted and were designated Supplement No. 4 to Rate Schedule No. 6. Petitioner's App. D at 27a-28a.

In August 1966, the Company and Ellwood City entered a new contract, containing a rate reduction, which was filed with and approved by the Commission.

Two months thereafter, Petitioner filed its complaint with the Commission seeking refunds of approximately $312,000. The sole legal argument Petitioner has made throughout this case is that only the rate filed in 1938 could legally be charged until a superceding rate was filed in 1964.

Thus, under Petitioner's theory, the Commission would be required to order refunds of all amounts paid above the 1938 filed rate without regard to the equities. The Administrative Law Judge disagreed with this proposition and held that the filed rate doctrine was not an inflexible restraint upon the Commission and that the Commission had the equitable power to refrain from ordering a refund. Alternatively, the Administrative Law Judge held that he had the discretion to reconstruct the past "to determine, as best we can, whether the rates in effect at the time would have been held to be just and reasonable, if appropriate filings had been made." Petitioner's App. A at 12a. Using this standard of review, the Judge found "even if a reconstruction of the past were required or deemed appropriate, it would show no substantial overcharges by Penn Power, justifying the ordering of refunds." *Id.* at 14a.

Ellwood City appealed the decision of the Administrative Law Judge to the Commission, which affirmed. The Commission found that Order No. 282 was consistent with its prior decisions. Petitioner's App. B at 18a. The Commission held that its discretionary power to excuse failures to file prior to August of 1964 was properly exercised since Penn Power "was not trying to avoid regulation but simply had picked the wrong forum." *Id.* at 19a. The Commission thereafter denied a petition by Ellwood City for rehearing. Petitioner's App. C.

Ellwood City then appealed to the Court of Appeals for the Third Circuit. Judge Higginbotham, speaking for that Court, affirmed, stating that the Commission had the discretion to issue Order No. 282 and apply that Order to the Company by excusing its past failures to file and, alternatively, that no rate was on file in 1964 to which the filed rate doctrine applied (the 1935 contract filed in 1938 having long since expired by its own terms). Petitioner's App. D

at 37a-38a. Judge Higginbotham aptly summarized this case:

> "This case is vivid illustration of Mr. Justice Holmes' maxim, '[A] page of history is worth a volume of logic.'[2] Only after one understands the history of the relationship between Penn Power, Ellwood, the Federal Power Commission and the Pennsylvania Public Utilities Commission does one recognize that the surface logic of Ellwood's contention leads to a conclusion inconsistent with the relevant statutes and the principle of consumer protection those statutes embody. The complexity of this case has been accentuated by Penn Power's having been lulled for over 25 years into believing that the Commission had no jurisdiction over the sales in question. Penn Power is not to be faulted for this belief, since the Commission itself assumed it was without jurisdiction over these transactions. During the period in which Penn Power did not file with the Commission, it did not operate without regulation. Its rates were reviewed by the Pennsylvania Public Utilities Commission which considered itself to have jurisdiction over these sales. Thus Ellwood is now demanding that the Commission order refunds on the basis of sales that the Commission had initially considered beyond its jurisdiction and which the Pennsylvania Public Utilities Commission had considered within its scope of authority.

"2. *New York Trust Co.* v. *Eisner*, 256 U.S. 345, 349, 41 S. Ct. 506, 507, 65 L. Ed. 963 (1921)." *Id.* at 25a.

Reasons for Denying the Writ

Petitioner argues that this case "falls squarely within the filed rate doctrine" and that therefore the decision of the Court of Appeals conflicts with filed rate doctrine decisions of both this Court and other courts. Petition at p. 13. There is, however, no such conflict; the filed rate doctrine

by its terms does not even apply to this case. Petitioner attempts to reinterpret that doctrine to limit the Commission's own authority.

Contrary to Petitioner's assertions, this case involves the very narrow question of whether the Commission had the discretion to excuse past failures to file rates by a Company which having once filed such a rate thereafter failed to file due to its good faith belief that the Commission had no jurisdiction over what were believed to be completely intrastate transactions. Although, as Judge Higginbotham stated, this precise question had not previously been subject to appellate review, there is no conflict with previous decisions. Petitioner's App. D at 32a. The decision of the Court of Appeals is in accord with all other precedent regarding the extent of the Commission's authority to excuse past non-compliance when the Commission first asserts its jurisdiction.

I. The Commission Has Equitable Power to Excuse Past Non-compliance When It First Asserts Jurisdiction

Following the Supreme Court decision in *Federal Power Commission* v. *Southern California Edison Co.*, 376 U.S. 205 (1964), the Commission began to regulate transactions which theoretically had always been within its authority. To deal with the problem of past failures to file the Commission formulated a policy announced in Order No. 282, 31 F.P.C. 972 (1964). In issuing Order No. 282, the Commission stated that "in the absence of valid objection by any interested party" it would not on its own look into past failures to file rate schedules by electric utilities who had assumed in good faith, albeit erroneously, that the Commission did not have jurisdiction over a company's wholesale

sales if that company had intrastate generation sufficient to meet the needs of its wholesale customers. *Id.* at 973.

The Court of Appeals upheld the power of the Commission to exercise discretion in this area. The Court found numerous analogous situations in which the Commission, faced with exercising jurisdiction over transactions previously ignored, forgave past failures in an effort to encourage compliance with the new regulatory scheme, as well as to avoid the administrative nightmare of attempting to deal with all past failures to file. In each case, following a landmark decision that the Commission had jurisdiction over certain types of transactions, the Commission established an effective date, later than the date of enactment of the Federal Power Act or the Natural Gas Act, from which to commence the exercise of its jurisdiction. Failures to comply with statutory provisions prior to that date were excused by the Commission. *E.g. California* v. *Lo-Vaca Gathering Co.*, 379 U.S. 366 (1965) followed by ***Hugoton Production Co.***, 41 F.P.C. 490 (1969); *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672 (1954) followed by Order No. 174, 13 F.P.C. 1195, *modified in part by* Order No. 174A, 13 F.P.C. 1410 (1954); *Public Service Co. of New Hampshire*, 27 F.P.C. 830 (1962) followed by ***Niagara Mohawk Power Corp.*** v. *FPC*, 379 F.2d 153 (D.C. Cir. 1967).

In *California* v. *Lo-Vaca Gathering Co.*, 379 U.S. 366 (1965) this Court upheld the Commission's jurisdiction over sales of natural gas which had been commingled with gas to be resold in interstate commerce. Many companies which had thought they were outside of the Commission's jurisdiction suddenly found that they were required to file their rates. The Commission excused all failures to file prior to its own decision in the *Lo-Vaca* case in 1961

because, as the Commission explained in *Hugoton Production Co.*, 41 F.P.C. 490, 497 (1969):

> "before the issuance of *Lo-Vaca*, we are of the opinion that the doctrine of that case may not have been predictable by many producers. Under the doctrine we determined that sales of gas to a pipeline where the gas sold is commingled with the inter-state stream is jurisdictional, although by contract the producer and pipeline agree that the gas is to be used in the same state or used for compressor fuel and not resold. The Producers might have felt, with some reason, that gas could have been isolated from the jurisdictional gas by contractual means. Therefore, we think as a matter of equity Hugoton should not be required to make a refund for this period."

The Commission took a similar course of action in Order No. 174 following this Court's decision in *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672 (1954), which made clear that independent producers of natural gas who sold in interstate commerce were subject to Commission regulation. The Commission in Order No. 174 stated:

> "Those producers and gatherers which come within the class found by the United States Supreme Court in the *Phillips* case to be subject to the Commission's jurisdiction should be afforded a reasonable opportunity to comply with the requirements of the Act to the end that the regulatory objectives of Congress may be achieved within the shortest feasible time. Also, in the interest of consumers, natural-gas companies and the public generally, practical considerations require us to deal with current problems which confront us as a consequence of the Court's decision and a reasonable cut-off date should be fixed in order

to avoid confusion in attempting to readjust past transactions." 13 F.P.C. at 1195.

The Commission thereafter established the date of the Supreme Court decision as the date it would commence enforcement of its jurisdictional powers.

Supported by this precedent, the Third Circuit, as well as the Commission and the Administrative Law Judge below, held that the Commission had authority to issue the directive in Order No. 282. As stated by the Third Circuit:

> "We conclude, however, that the Commission did act lawfully here. No statutory language prescribed the proper treatment for those who have in good faith failed to file. Excusing the past failures to file here is justified by several factors. Most significant is that the past failures to file were the result of a widespread misapprehension of the extent of the Commission's jurisdiction. Even the Court of Appeals in *Colton* shared this misapprehension. The failures to file were thus clearly in good faith. Since the companies were not culpable, they should not be punished for technical non-compliance." (footnote omitted) Petitioner's App. D at 32a-33a.

II. The Filed Rate Doctrine Does Not Preclude the Invocation of Equitable Discretion

Petitioner does not question the authority of the Commission to exercise discretion in deciding how to commence handling jurisdiction over utilities. Rather, Petitioner argues that once a utility has filed a rate, it cannot charge any other rate unless that rate is approved in the manner provided by the Federal Power Act. The basis for this "filed rate doctrine" is contained in § 205(c), (d) of the Federal Power Act, 16 U.S.C. § 824d(c), (d). Thus, according to Petitioner, while the Commission may excuse any utility for past non-compliance if that utility has never

filed a rate with the Commission, it cannot do the same for a utility which filed a rate twenty-five years before the Commission commenced exercising jurisdiction over the transactions in question.

The Court of Appeals disagreed with Petitioner and found that the fact that the Company had filed a rate long ago did not preclude the application of the Commission's equitable powers to the particular facts of the case before it. The Court found that the gist of the filed rate doctrine is that upon exercise of jurisdiction, no rate can thereafter be changed without compliance with statutory procedures. This is true whether a rate was initially filed or not.

> "[T]he filed rate doctrine provides no basis for distinguishing between companies who filed rates in the past and those who did not file at all. As already discussed, courts have held that where the Commission has jurisdiction over given sales and the parties have agreed to a certain rate, that rate may not be increased without prior filing even though the initial rate was never filed. Ellwood therefore has no greater claim to a refund than does any other purchaser whose supplier's past failure to file is excused pursuant to Order No. 282. Thus if the Commission has the discretion under these circumstances to excuse past failures to file and we have just held that it does, the filed rate doctrine imposes no special obstacle to the exercise of that discretion with respect to Penn Power here." (footnote omitted) Petitioner's App. D at 37a-38a.[4]

4. Alternatively, the Court of Appeals held that because the filed 1935 contract had expired by its own terms at a time when regulations did not require the filing of such termination, "there was no effective filed rate applicable to the sales in question and, as a result, the filed rate doctrine is not applicable." Petitioner's App. D at 37a.

The cases cited by Petitioner do not contradict this result.[5] Each case involved companies over which the Commission had already been exercising its jurisdiction. *E.g., Northwestern Public Service Co.* v. *Montana-Dakota Utilities Co.*, 181 F.2d 19 (8th Cir. 1950), *aff'd*, 341 U.S. 246 (1951); *Chicago, Milwaukee, St. Paul & Pacific Rr. Co.* v. *Alouette Peat Products*, 253 F.2d 449 (9th Cir. 1957). Obviously, once jurisdiction is recognized, the statutory procedures must be followed as long as jurisdiction exists. In each case in which a decision has been rendered finding greater jurisdiction than was generally believed to exist at the time of the enactment of the relevant statute, the Commission has applied its statutory procedures prospectively from the date its intention to exercise that greater jurisdiction was clear. *E.g., Hugoton Production Co.*, 41 F.P.C. 490 (1969); Order No. 174, 13 F.P.C. 1195 (1954). The filed rate doctrine is merely an example of one of those statutory procedures. In none of the cases cited by Petitioner has the filed rate doctrine been applied to limit the Commission's power to excuse past non-compliance with its governing statutes when the Commission first asserts its jurisdiction.

In the case of many electric utilities, including Penn Power, the jurisdictional question was not settled until the 1964 *Colton* decision. Since jurisdiction had existed since 1935, each electric utility theoretically should have filed rate schedules for each rate change since the passage of the

5. Petitioner's quotation from *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332, 343 (1956), is entirely out of context and is merely dictum. The issue in *United Gas* was whether a company could ignore the rate established in a contract merely by filing a new rate with the Commission, without negotiation with the other party to the contract. It was an attempt to misuse the statutory scheme by using the simple statutory notice requirement to excuse the company from contract provisions. The case had nothing to do with the extent of the Commission's power to excuse past non-compliance; rather the case dealt with whether the Natural Gas Act in any way substantively changed the rights of parties to a contract filed with the Commission.

Federal Power Act. *See, e.g., Cities Service Gas Producing Co.* v. *FPC*, 233 F.2d 726 (10th Cir.), *cert. denied*, 352 U.S. 911 (1956). To distinguish Penn Power from other electric utilities on the basis that it had once filed a rate is a distinction without a difference.

In reaching the conclusion that the filed rate doctrine was no bar to the Commission's exercise of its discretion, the Court of Appeals was greatly swayed by the fact that the protections offered by the filed rate doctrine would not be jeopardized by excusing the Company along with all other utilities which had not filed rates.

> "The doctrine has been applied under several regulatory schemes. It has meant somewhat different things to different circuits. The doctrine has been described as intending 'to prevent discriminatory rate payments', as 'reflecting a statutory bias in favor of retroactive rate reductions but not retroactive rate increases . . .' and as being primarily concerned with the 'preservation of the agency's primary jurisdiction over reasonableness of rates and the need to insure that regulated companies charge only those rates of which the agency has been made cognizant.'
>
> • • •
>
> "The purposes of the Act would not be furthered by such a result [applying the doctrine]. The underlying concern of the Act is to assure that the rates subject to its coverage are reasonable and that these rates are set and reviewed in a fair and orderly manner. Penn Power did not escape regulation by not filing with the Commission between 1940 and 1964. Its sales to Ellwood were subject to regulation by the Pennsylvania Public Utilities Commission and

all rate increases were filed with that agency." (footnotes omitted) Petitioner's Appendix D at 34a, 36a.[6]

In determining how best to commence asserting its jurisdiction in 1964, the Commission did nothing extraordinary requiring the attention of this Court. Rather, the Commission merely followed its general policy of refraining as a matter of equity from investigating past failures to comply with the statutory procedures when the failure was based on a good faith belief that the Commission did not have jurisdiction over the transactions in question. This action frustrates no purpose of the filed rate doctrine and conflicts with no prior decisions of any court.

---

6. The Administrative Law Judge had gone further than the Court of Appeals by stating that the purpose of the filed rate doctrine was to prevent interference with the Commission's jurisdiction by others.

> "The filed-rate doctrine fends off interference with a regulatory agency's jurisdiction; it does not impede the exercise of that jurisdiction. Stated simplistically, the rule is that the agency may accept or alter a rate, but the rate as filed, *i.e.*, accepted or altered by the agency, is binding and not elsewhere subject to question or attack. Ellwood's argument that the doctrine holds the agency in a vise that prevents it from dealing, in accordance with its authority and duty under its governing statutes, with certain types of exigencies within its jurisdiction is a perversion of the doctrine. The categorical terms in which the restraints imposed by the doctrine are sometimes couched are misconstrued by Ellwood as being addressed to the Commission, although they are meant to manifest the impregnability of the wall protecting the regulatory jurisdiction from intrusion.
>
> * * *
>
> "Not surprisingly, Ellwood has cited no case supporting the view that the filed-rate doctrine is a limitation on agency authority." Petitioner's App. A at 5a-6a.

Moreover, the Administrative Law Judge concluded that it would be inequitable and discriminatory not to include Penn Power within the coverage of Order No. 282 "which was intended to apply to all like late filers." *Id.* at 12a.

Conclusion

For the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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January 31, 1979

CERTIFICATE OF SERVICE

I hereby certify that I have this 31st day of January, 1979, served three (3) copies of the foregoing document by first class mail and with postage prepaid upon the following:

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